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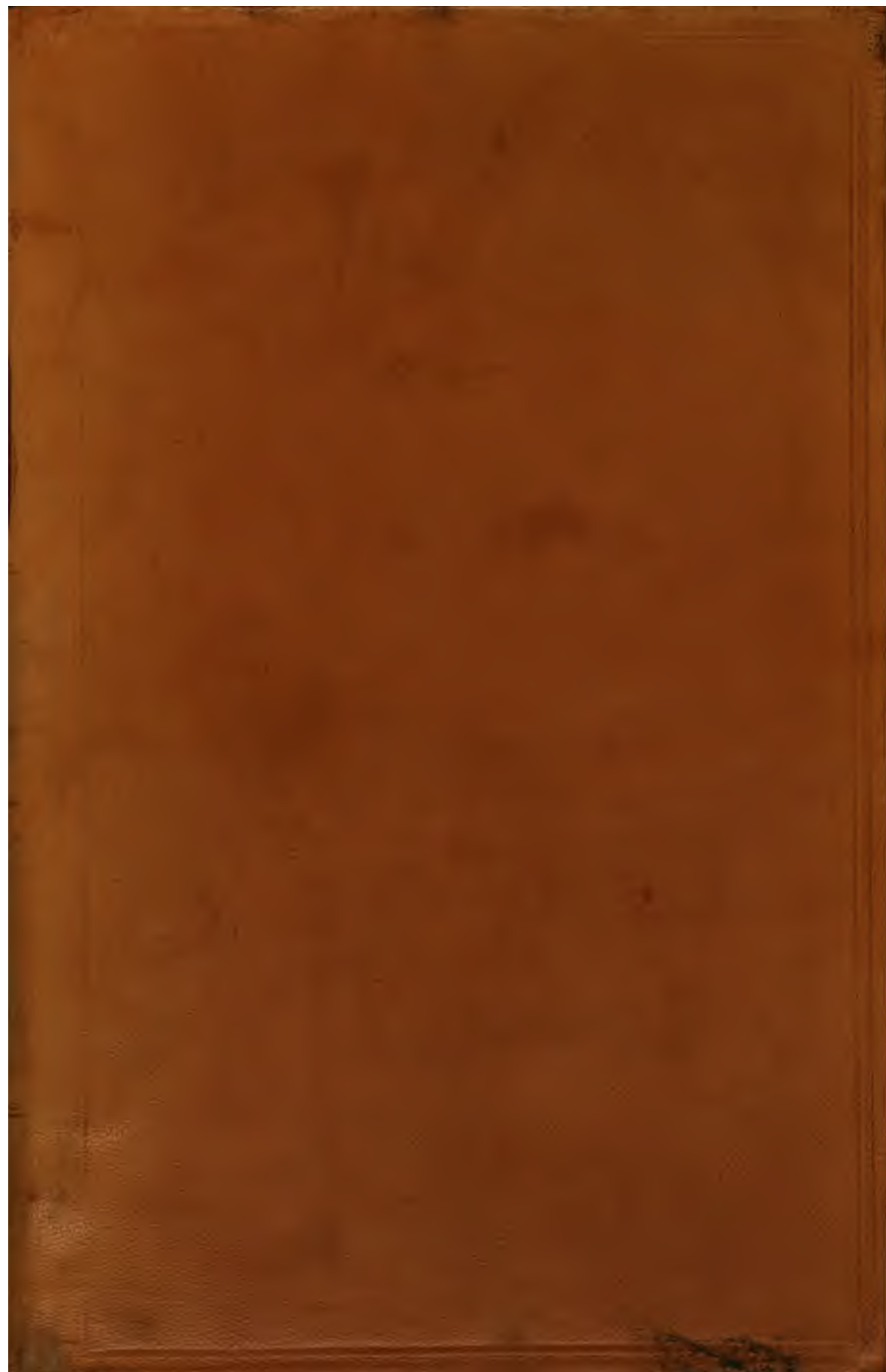
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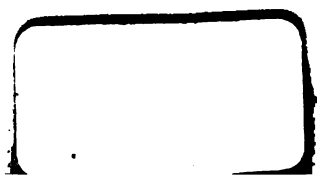
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RAILROAD REPORTS

(Vol. 51 American and English
Railroad Cases, New Series)

A COLLECTION OF ALL

CASES AFFECTING RAILROADS OF EVERY KIND,
DECIDED BY THE COURTS OF
LAST RESORT

IN THE

UNITED STATES,

EDITED BY

THOMAS J. MICHIE

VOLUME XXVIII.

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1908.

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RAILROAD REPORTS

SOUTHERN RY. CO. *v.* HANSBROUGH'S ADM'X.

(Supreme Court of Appeals of Virginia, Jan. 16, 1908.)

[60 S. E. Rep. 58.]

Costs—Stay of Subsequent Action until Payment.—Under Code 1904, § 3542, providing that the party to whom a new trial is granted shall, previous to new trial, pay the costs of a former trial, unless the court enter that the new trial is granted for misconduct of the opposite party, who in such case may be ordered to pay any costs, etc., a plaintiff, before proceeding to a second trial after reversal of judgment in his favor, and remanding a cause for a new trial with direction that defendant, plaintiff in error, recover of plaintiff, defendant in error, its costs, etc., need not pay the costs of the former trial, as well as the costs in the Supreme Court of Appeals on the writ of error.

Trial—Evidence—Objections—Waiver.—A party who, after the admission of evidence over his objections, introduces evidence on the same point, waives his objections.

Railroads—Crossing Accident—Contributory Negligence—Instructions.*—Where in an action for the death of a traveler struck by an engine at a highway crossing, contributory negligence of decedent was relied on, a charge authorizing a recovery unless the injury to decedent was caused by his own fault was erroneous, because it omitted the fact that, if decedent was only partially in fault and that fault contributed to his injury, there could be no recovery.

Same—Negligence.†—A railroad company and a traveler on a

*For the authorities in this series on the subject of the combined effect of negligence on the part of the railroad company and contributory negligence on the part of the highway traveler, in actions for injuries sustained at crossings, see foot-notes appended to *Baker v. Tacoma Eastern Ry. Co.* (Wash.), 22 R. R. R. 723, 45 Am. & Eng. R. Cas., N. S., 723.

†For the authorities in this series on the subject of the care required of a highway traveler to discover approaching trains before attempting to cross railroad tracks, see foot-notes appended to *MacFeat v. Philadelphia, etc., R. Co.* (Del. Sup'r Ct.), 24 R. R. R. 56, 47 Am. & Eng. R. Cas., N. S., 56; foot-notes appended to *Louisville & N. R. Co. v. Lucas's Adm'r* (Ky.), 22 R. R. R. 739, 45 Am. & Eng. R. Cas., N. S., 739; *Bamberg v. Atlantic Coast Line R. Co.* (S. Car.), 22 R. R. R. 20, 45 Am. & Eng. R. Cas., N. S., 20; *Norris v. New York, etc., R. Co.* (Conn.), 22 R. R. R. 17, 45 Am. & Eng. R. Cas., N. S., 17.

For the authorities in this series on the subject of the duty to maintain lookouts upon trains approaching highway crossings, see foot-notes appended to *Cooper v. North Carolina R. Co.* (N. Car.), 19 R. R. R. 857, 42 Am. & Eng. R. Cas., N. S., 857.

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highway crossing are charged with a mutual duty of keeping a careful lookout for danger, and the degree of vigilance is in proportion to the known danger; the greater the danger, the greater the care required of both.

Same—Care Required of Traveler.†—A traveler on a highway crossing a railroad track must, before crossing, use his sense of sight and hearing, and the looking and listening must be effective; and, when the exercise of his faculties would warn him of an approaching train, it is negligence for him to enter on the track, though he may be oblivious of the train.

Same—Contributory Negligence—Effect.§—The negligence of a railroad company in approaching a highway crossing with an engine does not authorize a recovery for the death of a traveler at the crossing, unless the negligence of the company is the sole proximate cause of the accident, or unless the traveler is lulled into security.

Same—Contributory Negligence—Burden of Proof.||—The fact that a railroad company was negligent in running its engine, which collided with a traveler at a crossing, did not impose on it the burden of proving that the traveler failed to do what he should have done, or did that which would not have been done by a reasonably prudent person, and the question whether or not he exercised care was for the jury, without any intimation from the court as to what weight was to be given to the evidence.

Same—Misleading Instructions.—Where, in an action for the death of a traveler struck by an engine at a crossing, the evidence showed that decedent could by rising in his seat and looking to one side have viewed the track for a considerable distance, and observed the approaching engine, etc., an instruction that, if the jury believed that the company was guilty of violating a municipal ordinance fixing the maximum speed of engines, the presumption was that decedent did what the law required of him in approaching the crossing, was misleading, because calculated to create in the minds of the jury the belief that there was no evidence of decedent's negligence, and authorized a verdict on presumption in favor of plaintiff, instead of on the facts proven.

Same.—In an action for the death of a traveler in a collision with an engine at a crossing, an instruction assuming that the only duty imposed on decedent was that of looking, leaving out of view the

†See preceding case, and foot-notes.

§See foot-notes appended to *Byrd v. Southern Express Co.* (N. Car.), 19 R. R. R. 150, 42 Am. & Eng. R. Cas., N. S., 150; *Norfolk & W. Ry. Co. v. Gesswine* (C. C. A.), 20 R. R. R. 553, 43 Am. & Eng. R. Cas., N. S., 553.

||For the authorities in this series on the subject of the burden of proving contributory negligence, see foot-notes appended to *Edington v. St. Louis, etc., R. Co.* (Mo.), 24 R. R. R. 707, 47 Am. & Eng. R. Cas., N. S., 707; foot-notes appended to *MacFeat v. Philadelphia, etc., R. Co.* (Del. Sup'r Ct.), 24 R. R. R. 56, 47 Am. & Eng. R. Cas., N. S., 56.

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further duty of listening for the approach of the engine, was misleading, since all that the company was required to do was to show circumstances from which reasonable men might draw the inference that, had decedent looked or listened, he would have seen or heard the engine approaching in time to have avoided the injury, notwithstanding its own negligence in running the engine at an excessive speed.

Trial—Instructions—Applicability to Evidence.—Where, in an action for the death of a traveler in a collision with an engine at a crossing, the uncontradicted evidence showed that, when decedent was discovered on the track, everything possible was done by the engineer to avoid a collision, an instruction that, though decedent was negligent, yet if the company could, by the exercise of ordinary care, have avoided the accident, decedent's negligence did not excuse the company, and plaintiff was entitled to recover, was erroneous because of the absence of evidence on which to base it.

Railroads—Accidents at Crossings—Negligence.¶—Proof that a railroad company ran its engine in violation of a municipal ordinance fixing the maximum speed does not create a cause of action for the death of a traveler struck by the engine at a crossing, unless it is shown that the unlawful rate of speed was the sole proximate cause of the accident.

Appeal—Erroneous Instructions—Prejudicial Error.—Where, in an action for the death of a traveler struck by an engine at a crossing, the company mainly relied on the plaintiff's evidence to establish decedent's contributory negligence, an instruction which permitted the jury to look for ordinary care and negligence beyond the evidence and to speculate as to what the company might or ought to have done to have avoided the injury was prejudicial to it.

Trial—Instructions—Cure by Other Instruction.—An instruction prejudicial to a party is not rendered harmless by his asking for and obtaining an instruction setting forth its version of the law applicable to a state of facts dealt with in the prejudicial instruction.

Same—Inconsistent Instructions.—Where contradictory instructions on a material point in a case have been given, the verdict should be set aside.

Same—Ignoring Evidence.—Where, in an action for the death of a traveler struck by an engine at a crossing, the evidence showed that the company was not responsible for sheds obstructing the view of a train on the track approaching the crossing, an instruction that

¶For the authorities in this series on the question whether the violation or ordinances limiting the speed of trains or street cars is negligence, see foot-notes appended to *MacFeat v. Philadelphia, etc., R. Co.* (Del. Sup'r Ct.), 24 R. R. R. 56, 47 Am. & Eng. R. Cas., N. S., 56; foot-notes appended to *Schmidt v. Missouri Pac. Ry. Co.* (Mo.), 21 R. R. R. 806, 44 Am. & Eng. R. Cas., N. S., 806; *Bressee v. Los Angeles Traction Co.* (Cal.), 20 R. R. R. 537, 43 Am. & Eng. R. Cas., N. S., 537; foot-notes appended to *Kansas City, etc., R. Co. v. Williford* (Tenn.), 19 R. R. R. 549, 42 Am. & Eng. R. Cas., N. S., 549.

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the existence of the sheds did not affect plaintiff's case, and that decedent was not responsible for them, provided they had been there sufficiently long prior to the accident to give the company knowledge of their existence, was erroneous because it ignored the evidence; and, though the existence of the sheds imposed on the company a greater degree of care, a like degree of care was also imposed on decedent, who had knowledge of the situation.

Same—Contradictory Instructions.—In an action for the death of a traveler struck by a train at a crossing, an instruction that the fact that, sheds obstructing the view of a train approaching the crossing, ran into a street, could not affect plaintiff's case, and that decedent was not responsible for the sheds being in the street, provided they had been there sufficiently long prior to the accident to give the company knowledge of their existence, was in conflict with an instruction stating that the sheds imposed a different duty on decedent in approaching the crossing from that which would have been imposed on him, had not the sheds obstructed the view, necessitating a setting aside of the verdict.

Same—Evidence—Instructions.—Where, in an action for the death of a traveler struck by an engine at a crossing, there was nothing in the surroundings of the accident which decedent could construe as an invitation to him to cross the track, and thereby lull him into the belief that he could safely do so, an instruction on the theory that decedent was without fault, and was confronted with a sudden danger brought about by the negligence of the company, excusing him from the exercise of reasonable care, was not justified by the evidence.

Same.—Where the facts in a case are few, and two or three instructions directed to the material questions are ample to submit the case to the jury, the court should not multiply its instructions.

Error to Circuit Court of City of Alexandria.

Action by Hansbrough's administratrix against the Southern Railway Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

See 54 S. E. 17.

Norton & Boothe, for plaintiff in error.

C. C. Carlin, H. O'B. Cooper, Francis L. Smith, and Robert B. Tunstall, for defendant in error.

CARDWELL, J. When this case was here on a former occasion, the judgment of the circuit court was reversed, because of error in the ruling on the demurrer to the declaration, and the cause remanded for a new trial; the order of the court remanding the case providing "that the plaintiff in error recover of the defendant in error out of the estate in her hands to be administered its costs by it in this behalf expended."

Upon the calling of the case below for the new trial, it was

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claimed by the defendant company that the order of this court was, in effect, a new trial awarded to the plaintiff, and that, under section 3542 of the Code of 1904, the plaintiff, before proceeding to another trial, should be required to pay the costs of the former trial as well as the costs in this court upon the writ of error to the judgment at the first trial. The refusal of the circuit court to sustain this contention constitutes the defendant company's first assignment of error to the judgment in favor of the plaintiff at the second trial.

The section of the Code relied on is as follows: "The party to whom a new trial is granted shall, previous to such new trial, pay the costs of the former trial, unless the court enter that the new trial is granted for misconduct of the opposite party, who, in such case, may be ordered to pay any costs which seem to the court reasonable. If the party, who is to pay the costs of the former trial, fail to pay the same at or before the next term after the new trial is granted, the court may, on the motion of the opposite party, set aside the order granting it, and proceed to judgment on the verdict, or award execution for said costs, as may seem to it best." Va. Code 1904, § 3542.

Manifestly the statute applies only to the costs of the former trial in the trial court, and not to the costs in this court incurred upon a writ of error; but, if it applied to costs incurred in this court, the defendant could not invoke its provision, since it imposes the burden upon the party obtaining the new trial, and not upon his adversary, who has obtained a judgment in his favor at the former trial, and is compelled, but not at his motion, to try his case again. The authorities cited by the defendant company have no application to the record presented upon this second writ of error in the case.

The second trial was had upon an amended declaration, alleging the violation by the defendant company of an ordinance of the city of Alexandria as to the maximum rate of speed of trains passing through the city, and that plaintiff's intestate, by reason of a violation of this ordinance, was killed by the defendant company while he was properly and lawfully using a street to cross the railway track, and, with the view of showing that the deceased did not fail to do what a person of ordinary prudence would have done under the circumstances, evidence was offered to prove obstructions at the crossing rendering the looking and listening of the deceased for approaching trains unavailing, and that, by reason thereof, he was not guilty of contributory negligence in going upon the railway track in front of the engine with which he collided. Objection was made to the introduction of this evidence, which objection was overruled, and this ruling constitutes the defendant company's second assignment of error.

It suffices to say, with reference to this assignment, that the defendant company is to be taken as having waived objection to

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this evidence, as it introduced not only evidence as to the surroundings of the crossing where the accident occurred, but photographs thereof; the purpose being the same as that of the plaintiff, to show what were the obstructions in question on the occasion of this accident.

"If a party objects to the introduction of evidence which is admitted, and afterwards introduces the same evidence himself, it is not ground for reversing the judgment, although the evidence objected to was incompetent." *N. Y. L. Ins. Co. v. Taliaferro*, 95 Va. 522, 28 S. E. 879; *Southern Ry. Co. v. Blanford's Adm'r*, 105 Va. 373, 54 S. E. 1.

We pass over assignments of error Nos. 3, 4, and 5, with the remark only that they become immaterial in the view we take of the case on the assignments of error in instructions to the jury.

Viewed as upon a demurrer thereto, the evidence tended to prove the following facts: The decedent, George C. Hansbrough (white), had been for about 10 months prior to the day of the accident causing his death (May 19, 1904) in the employ, as a driver, of the Belle Pre Bottle Company, whose works are located on the north side of Madison street, near its intersection with Henry street, in the city of Alexandria, Va. During the whole of his employment deceased had been driving the same horse to the same wagon which he was driving at the time of this accident. He was entirely familiar with the surroundings of the crossing of Madison street over Henry street, upon which the main track of the defendant company is located; and no one knew better than he that over and along this track, going north and south, not only regular scheduled passenger and freight trains in considerable numbers passed daily, but extra trains, shifting engines with cars to be distributed upon the yards at Alexandria, and engines running "light" passed frequently and at irregular hours. Deceased passed over this crossing at the intersection of Madison and Henry streets in the line of his employment many times during the day. On the day in question he started out from the bottle company's works upon his wagon loaded with boxes filled with bottles, one of which boxes was mounted on the seat occupied by him, and on the boxes at the rear end of the wagon was seated a colored youth, named Johnson. The distance from the gate of the bottle company, which opens into Madison street, to the crossing in Henry street, is about 140 feet. Along the greater part of this route on the north side of Madison street there is a shed upon the property of the bottle company, which from a level with the street is about 9 feet, or 9 feet 6 inches, at its highest point. The wagon upon which the deceased was seated was very tall, and had attached thereto what is called a "footboard" upon which the feet of the driver rested when seated. The day was bright and clear and everything quiet; there being nothing to interfere with the hearing of the deceased, except the rattling of the wagon and its

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contents as it journeyed along Madison street to the railroad crossing. The intersection referred to is in the extreme northern end of the city; there being no houses north of the intersection, except perhaps one house, the country being open and the view unobstructed for a mile and as far north as what is known as "St. Asaph Junction." Along Madison street to its intersection with Henry street the obstruction of the view of the railroad track north is almost continuous, except one upon open space between the office of the bottle company and the shed of about 20 feet, through which open space an engine or train may be seen upon the railroad track fully a mile to the north. The railroad track runs along and upon Henry street at grade, northward towards Washington and southward towards Alexandria City. On the occasion of the injury to deceased an engine of the defendant company, moving from the north towards the south, running "light"—i. e., detached from any train—about noon struck the wagon upon which the deceased and the negro Johnson were riding at the intersection of the streets named, demolishing the wagon, and killing the deceased and the horse; Johnson escaping unhurt. It had been the custom of the defendant company for several years previous to the accident to run this engine down from Washington daily, detached from any train, about the same time of day and on the same track. The horse which the deceased was and had been driving during his employment was gentle, quiet, and not at all afraid of trains. The negro, Johnson, who was on the rear end of the wagon, was seated with his back towards deceased, upon the top of the boxes which were loaded to the level of the seat upon which deceased was sitting. Johnson was a youth of small stature, while the deceased was a tall man, being 5 feet 10½ inches. in height, and the height of the engine in question from the rail to the top of the cab was 13 feet, 7 inches, and to the top of the smokestack 14 feet, 9 inches. There was no electric gong, gates, or watchman required by ordinance of the city of Alexandria, or permitted, nor had there ever been either at the intersection of Madison and Henry streets. As to the speed of the engine inflicting the injury to deceased, the evidence is, as usual in such cases, conflicting; and such is also the case as to whether or not the bell on the engine was being rung, as required by the city's ordinance, and the plaintiff relies upon the alleged violation of the ordinance of the city with reference to the speed of the engine and the failure to ring the bell as the proximate causes of the collision, resulting in the death of her intestate.

For the guidance of the jury in determining the narrow questions of fact submitted to them in this case, the plaintiff asked for and obtained, practically as asked, 10 instructions, and the defendant asked for 23, all of the plaintiff's instructions being given over the objection of the defendant, and of the defendant's instructions 4 were given without alteration or amendment. Nos.

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2, 4, 5, 6, 17, and 21 were refused, and the remainder modified or amended and given, exception being taken to the rulings of the court refusing instructions not granted and modifying or amending others. To review these numerous instructions, or to discuss in detail the exceptions taken to the rulings of the circuit court with reference thereto, would extend this opinion to an unreasonable length, and would serve no good purpose.

We are of opinion that upon plaintiff's instructions alone the jury were necessarily confused, if not misled, in considering the facts of the case. Many of them are based upon the decisions of this court in *Kimball & Fink v. Friend's Adm'r*, 95 Va. 125, 27 S. E. 901, and *Southern Ry. Co. v. Bryant's Adm'r*, 95 Va. 212, 28 S. E. 183, the facts in both of which are dissimilar to those attending the accident in this case. In the first-named case the track was obstructed until within a few feet of the rail, and it would have been impossible to have seen the approach of the train while traveling through a cut 10 or 15 feet deep; the obstructions on either side being on the property of the railroad company. On account of the dangerous character of the crossing of the highway over the railroad track, the railroad company some years before had erected immediately east of the crossing, on the north side of the highway, an electric gong or bell to warn passengers of approaching trains, the silence of which was regarded as an invitation to a traveler to cross the track, and an assurance to him that he could safely do so. In the second-named case, the evidence tended to show that looking would have been wholly unavailing, and even had Bryant, the deceased, left his wagon and gone to the railroad track and looked, the topography of the country and the curvature of the track were such that he could have seen but a short distance along the track, and could not have avoided the injury. It will readily be seen, therefore, that an instruction based upon the facts of those cases would not apply to the facts of this case.

Here plaintiff's instruction No. 2 conveyed the idea to the jury that she was entitled to recover unless the injury to her intestate "was caused by his own fault," leaving out of view that, if it were true that the deceased was only partially in fault and yet that fault contributed to his injury, the plaintiff could not recover. The doctrine of contributory negligence, earnestly relied on by the defendant, was wholly excluded from the consideration of the jury by this instruction.

Instruction No. 4 is as follows: "If the jury believe from the evidence that the defendant was guilty of violating the ordinance of the city of Alexandria which was introduced in evidence, and if they further believe that there is no evidence in this case to the contrary, then the presumption is, though slight, that the plaintiff's intestate did his duty and what the law required of him in approaching the crossing, and they should find for the plaintiff."

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It has been over and over repeated in the decided cases that both a railroad company and a traveler on a highway crossing a railroad track are charged with the mutual duty of keeping a careful lookout for danger, and the degree of vigilance required is in proportion to the known danger; the greater the known danger, the greater the care and precaution required of both the railroad company and the traveler.

In Mark's Case, 88 Va. 4, 13 S. E. 300, it is said: "A traveler must be vigilant, and on an intersecting highway, before crossing the railroad, must use his sense of sight and hearing. He must look in every direction that the rails run to make sure that the crossing is safe, and his failure to do so will, as a general rule, be deemed culpable negligence."

What was there said has been often repeated in later decisions with the emphasis that the looking and listening must be when to look and listen would be effective, and that it is not enough to look and listen at a great distance, or when from other causes looking and listening would be unavailing, but the care must be in proportion to the known danger. Wash. So. Ry. Co. v. Lacey, 94 Va. 466, 26 S. E. 834; Stoke's Adm'r v. So. Ry. Co., 104 Va. 819, 52 S. E. 855; So. Ry. Co. v. Jones, 106 Va. 417, 56 S. E. 155.

If the exercise of his facilities would warn him of an approaching train, it is negligence for a traveler to enter on a railroad track, though as a matter of fact he may be oblivious of an approaching train, neither seeing or hearing it. As was said in Southern Ry. Co. v. Mauzy, 98 Va. 692, 37 S. E. 285, thoughtlessness is negligence.

It is not to be lost sight of, in a case like this, that the negligence of the railroad company does not excuse the performance of the traveler's reciprocal duties, as the negligence of the railroad company does not entitle the plaintiff to recover, unless it be the sole proximate cause of the injury complained of. Railroad Co. v. Reiger, 95 Va. 418, 28 S. E. 590. The rule is different where the traveler is lulled into security, whereby he is relieved from the imputation of negligence, as in cases in which some local agency of the railroad company is out of place or out of order. In the case of Kimball & Fink v. Friend's Adm'r, *supra*, the local agency was a gong which was silent; and in Southern Ry. Co. v. Aldridge's Adm'r, 101 Va. 142, 43 S. E. 333, it was a watchman who was out of place.

In this case there were no such agencies; indeed, nothing to relieve the deceased of his duty to take such precautions for his own safety as under the surroundings of his situation might reasonably have been expected of him, and the fact that the defendant was negligent in running its engine at an unlawful rate of speed, and collided with the deceased at a public crossing, did not impose upon the defendant the burden of proving that the

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deceased did not perform his duty, in that he failed to do a particular thing that he might have done, or did that which, under the circumstances, would not have been done by a reasonably prudent person. The question whether or not he did what, under the facts and circumstances which the evidence tended to prove, was reasonably to be expected of him, should have been left to the jury, without any expression or intimation from the court as to what weight was to be given to the evidence. It would be a most unreasonable requirement of the defendant in such a case that it show that the injured party omitted to do what the facts and circumstances proved he might have done and avoided the injury. This would be, in effect, to require proof of a negative, and take from the consideration of the jury the right to infer from the facts and circumstances surrounding the injury that it was the result of the negligence of the party injured, or the concurrent negligence of both parties.

As this court said in *Southern Ry. Co. v. Alridge's Adm'r*, *supra*, we have never been called upon to say that it was the duty of a traveler, on approaching an intersection of a railroad track, to stop, look, and listen, when looking and listening without stopping would be unavailing; but there is no sanction in that or any other decision of this or any other court of an instruction so well calculated as is the instruction we are now considering to mislead the jury to an utter disregard of facts and circumstances which plainly disclose thoughtlessness and a disregard of the known dangers surrounding the traveler from which reasonably fair-minded men, acting as jurors, might have considered that this thoughtlessness, not only contributed to his injury, but was its proximate cause.

It was only under the peculiar circumstances of that case that the court in *Southern Ry. Co. v. Bryant's Adm'r*, *supra*, said that it could not be inferred as a matter of law that Bryant did not listen because he drove upon the track without stopping; the instinct of self-preservation forbidding the imputation of recklessness to any one; that where a traveler approaches a railroad crossing, and the negligence of the railroad company is established, in the absence of evidence to the contrary, the presumption is, though perhaps slight, that the traveler did his duty in approaching the crossing. But as well stated in the opinion of Harrison, J., in *Newport News R. Co. v. Beaumeister*, 102 Va. 677, 47 S. E. 821, the court in *Bryant's Case* was dealing with the presumptions of law attendant upon the absence of evidence, and held that, where the evidence tends to show negligence on the part of both the plaintiff and the defendant, the verdict of the jury must rest upon the facts proven and the inferences to be reasonably drawn therefrom, and not upon the presumptions of law in favor of either party.

In this case, while the evidence is to be considered sufficient to

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establish the negligence of the defendant company, it also tended to prove that the deceased had a clear view of the railroad track from the point where he started in the yard of the bottle company as far north as about one mile; that after mounting his seat, ready for the start on the trip he was to make across the railroad track, the deceased could by the simple act of turning his head, and looking to one side have viewed the track north for the distance mentioned, observed the approaching engine, and avoided the collision with it at the intersection of the street along which he was to make his journey with the railroad track; that after entering upon Madison street, and after going about 30 or 40 feet, there was a second viewpoint, through an open space between the office of the bottle company and the obstructing shed, of about 20 feet, through which opening he could have seen up the track in the direction from which the engine was coming for nearly a mile, unless this view at the time was obstructed by a pile of lumber, as to which there was some evidence; that, after leaving this last-named point, it is a distance of about 90 or 100 feet to the east end of the shed nearest the railroad (the only obstruction being the shed), and at any point along the journey, at any distance from the point of collision, the deceased could, by simply rising from his seat upon the front end of the wagon, have looked over the entire shed northward and seen the engine approaching for a considerable distance certainly in time to have avoided a collision with it; that it had been (as testified to by two of plaintiff's witnesses) the habit of the deceased to rise from his seat, and, standing upon his footboard, look over this shed for approaching trains; that after clearing the obstruction entirely, and before reaching the track, he could have seen the engine in time to have stopped his horse and avoided the collision, and this without rising from his seat. While to obtain this last view the horse would have been close to the rail, the evidence is abundant that this was a safe, quiet horse, accustomed to meeting trains hourly, and not at all excited by their presence. The evidence tended to prove, further, that, by bending the body and leaning a little forward, the deceased could have seen 150 or 200 feet up the track just as he reached the end of the shed, and by stopping his horse at this point, which he could have done with entire safety, the collision would have been avoided; that while deceased drove upon the track in front of the approaching engine, resulting as stated in his death and that of the horse, and the destruction of the wagon, the negro, Johnson, riding on the rear end of the wagon with his back to deceased, either heard or saw the approaching engine in time to alight from the wagon and escape injury, and that others farther away heard the engine approaching the crossing.

"It is the duty of a traveler in the full enjoyment of his faculties of hearing and seeing, upon a highway approaching a rail-

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road crossing, before he attempts to pass or drive over, to exercise a proper degree of care and caution, and to make vigilant use of his eyes and ears for the purpose of ascertaining whether a train is approaching; and, if by a proper use of his faculties he could have escaped injury and fails to do so and is injured, he is chargeable with contributory negligence, and cannot maintain an action against the company. And this rule applies, although the railroad company fails to give the proper cautionary signals." *McCanna v. New Eng. R. Co.*, 20 R. I. 439, 39 Atl. 891, and authorities cited in note to that case. See, also, the opinion and authorities cited in *Smith's Adm'r v. N. & W. Ry. Co.*, (just decided by this court) 60 S. E. 56.

In view of the facts which the evidence in this case tended to prove, instruction No. 4 was not only misleading and calculated to create upon the minds of the jury the belief that the court was of opinion that there was no evidence tending to establish the negligence of plaintiff's intestate, but erroneously authorized the jury to rest their verdict upon presumptions in favor of the plaintiff instead of upon the facts proven, and the inferences to be reasonably drawn therefrom.

Instruction No. 5 is erroneous, in that it assumes that the only duty imposed upon the decedent was that of looking, leaving wholly out of view the further duty which the law imposed upon him of listening for the approach of a train. It was well calculated to mislead the jury; for, although the deceased may not have been able to see the approaching engine, he still might have heard it by listening; and it was not incumbent upon the defendant to prove by positive evidence that he neither looked nor listened. All that the defendant could have been required to do was to show facts and circumstances from which reasonable men might draw the inference that had he looked or listened, he would have seen or heard the engine approaching in time to have avoided injury, notwithstanding the negligence of the defendant.

The next instruction for the plaintiff complained of is No. 7, which is as follows: "The court instructs the jury that although the plaintiff's intestate may have been guilty of negligence, and that although that negligence may in fact have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the accident which happened, the plaintiff's intestate's negligence will not excuse the defendant company, and the plaintiff is entitled to recover."

This instruction is taken from the case of *Kimball & Fink v. Friend's Adm'r*, *supra*, and the facts of that case justified the giving of the instruction; but there is no evidence whatever in this case tending to prove that, though the decedent had contributed to his injury, the defendant could, by the use of ordinary care and diligence, have avoided the injury. The uncontradicted evi-

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dence is that when the deceased was discovered upon, or approaching nearly to, the track, everything possible was done by the engineer in charge of the approaching engine to avoid a collision with his wagon.

In *C. & S. Rd. Co. v. Thomas*, 33 Colo. 517, 81 Pac. 801, it is said: "Where, in an action for death at a railroad crossing, it was conclusively shown that it was impossible for the engineer to avoid collision after he saw the vehicle in which deceased was riding approaching the track by the exercise of the utmost degree of care, it was error for the court to submit the issue of discovered peril to the jury."

We need not repeat here a citation of the authorities for the proposition of law that although the defendant was running its engine at an unlawful rate of speed, this does not create a cause of action, unless it be shown that it was the sole proximate cause of the injury, since the court will not undertake to determine which was guilty of the greater fault, but, where both are at fault, the plaintiff cannot recover.

There are few disputed facts disclosed by the evidence in this case; the plaintiff's evidence being relied upon mainly to establish the decedent's contributory negligence. Therefore an instruction which permitted the jury to look for ordinary care and diligence beyond the evidence, and to speculate or conjecture as to what the defendant might, could, or ought to have done to have avoided the injury to the deceased, is necessarily to be considered as harmful to the defendant. It will not do to say that this instruction was harmless because the defendant asked for and obtained an instruction setting forth its version of the law applicable to a state of facts dealt with in an instruction given for the plaintiff over the objection of the defendant.

This instruction is also to be considered as harmful to the defendant because contradictory of instructions Nos. 15, 16, 18, and 19 given for the defendant.

"When contradictory instructions on a material point in a case have been given, the verdict of the jury should be set aside, as it cannot be said whether the jury were controlled by the one or the other." *C. & O. Ry. Co. v. Whitlow*, 104 Va. 90, 51 S. E. 182.

Plaintiff's instruction No. 8 is erroneous for the reason that it tells the jury as a matter of law that "the fact that the sheds ran into the street can in no way effect the plaintiff in the case; i. e., plaintiff's intestate could not be held responsible for the sheds being in the street, if there with or without lawful authority, provided they had been in the street sufficiently long prior to the accident to give defendant knowledge of their existence in the street"—ignoring the fact shown that the defendant was in no way responsible for the location of the sheds and their obstruction of the view of a train on its railroad track approaching the crossing in Madison and Henry streets from the north. True, the

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existence of these sheds imposed upon the defendant a greater degree of care in running its engines and trains over the crossing than could have been reasonably required of it had the sheds not been there; but the presence of the sheds in no way relieved the plaintiff's intestate from the exercise of a like degree of care for his own safety in driving upon the railroad track at the crossing. Especially is this true as the deceased, as shown by plaintiff's evidence, had thorough knowledge of the existence of the sheds, and of the manner in which they obstructed the view of the railroad track, imposing upon him, as upon the defendant, the duty to use care "in proportion to the known danger." The instruction is, furthermore, in direct conflict with instructions granted on behalf of the defendant, which told the jury that these sheds did impose a different duty upon the deceased in approaching the railroad crossing from that which would have been imposed upon him had not the sheds obstructed the view of the railroad track to the north, and it cannot be said by which theory of the instructions the jury were guided.

Instruction No. 10 is not justified by any facts which the evidence in the case tended to prove. It proceeds upon the theory that the deceased was without fault, and was confronted with a sudden danger brought about by the negligence of the defendant, excusing him from the exercise of reasonable care for his own safety. There was nothing whatever in the surroundings of the accident to decedent which could have been construed or considered as an invitation to him to cross the railroad track, and thereby lulling him into the belief that he could safely do so.

A number of other errors are assigned to the rulings of the trial court and elaborately argued, but we consider that we have sufficiently indicated the views of this court as to the principles of law applicable to the facts which the evidence tended to prove to render it unnecessary to prolong this opinion in a discussion of these assignments.

We are constrained to again call attention to the prevalent practice of multiplying instructions wholly out of proportion to the necessities of the case, when, as in this case, the controlling facts and circumstances are few, and two or three instructions limited and directed to the material questions presented would have been ample to properly submit the case to the jury.

For the reasons stated, the judgment of the circuit court will be reversed, the verdict of the jury set aside, and the cause remanded for a new trial to be had not in conflict with the views herein expressed.

Reversed.

DYERSON *v.* UNION PAC. R. CO.

(Supreme Court of Kansas, Nov. 10, 1906.)

[87 Pac. Rep. 680.]

Master and Servant—Injury to Servant—Contributory Negligence.—The rule that a railroad employee who is engaged in the discharge of a duty, the performance of which requires him to be on or near the track, need not keep a strict watch for approaching trains in order to be deemed to be exercising reasonable care for his own protection, does not apply to the case of an employee who is injured while attempting to cross a track merely for the purpose of getting from one point to another; the circumstances not requiring the crossing to be made at a particular time or place.

Same.—The fact that such employee works close to a track and has frequent occasion to pass back and forth over it does not relieve him from the requirement that, in order that he may be deemed to be in the exercise or ordinary diligence, he must look in both directions for an approaching train before undertaking to cross it.

Same—Last Clear Chance.—The fact that such an employee knows that it had previously been the rule and practice of the company to run trains along said track only in one direction except under unusual circumstances, does not relieve him from such requirement, although a change has been made in such rule and practice without notice to him.

Same.*—A plaintiff who has received an injury occasioned by the negligence of the defendant, but who could have avoided it by the exercise of ordinary care on his own part, cannot recover damages therefor, although the defendant ought to have discovered (but did not, in fact, discover) his peril in time to have prevented the accident, where the plaintiff's negligence continued up to the very moment he was hurt, and where the exercise of reasonable diligence before that time would have warned him of his danger and enabled him to escape by his own effort.

(Syllabus by the Court.)

Error from Court of Common Pleas, Wyandotte County; Wm. G. Holt, Trial Judge.

Action by Charles W. Dyerson against the Union Pacific Rail-

*For the authorities in this series on the question whether there may be a recovery against a railroad for injuries caused by running a train or car against a person, where he was guilty of contributory negligence but his peril should have been discovered in time to have prevented the collision, see foot-notes appended to *Texas & P. Ry. Co. v. Modawell* (C. C. A.), 23 R. R. R. 345, 46 Am. & Eng. R. Cas., N. S., 345.

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road Company. Judgment for defendant, and plaintiff brings error. Affirmed.

C. F. & S. D. Hutchings and *E. L. Fischer*, for plaintiff in error.

N. H. Loomis, *R. W. Blair*, and *H. A. Scandrett*, for defendant in error.

MASON, J. Charles W. Dyerson was run into by an engine and tender of the Union Pacific Railroad Company and severely injured. He sued the company for damages, alleging that this injury was occasioned by the defendant's negligence. At the trial the court rendered judgment against him upon his petition and his preliminary statement to the jury. He prosecutes error.

The material facts disclosed by the plaintiff's pleading and statement may be thus summarized: He had for some time been employed by the company in the Kansas City yards. At the time of his injury he was known as a "car repairer" and one of his duties was to supply cars with ice. Ice for this use was kept in a box four feet high, four feet wide, and eight feet long, placed parallel with a double track, four or five feet north of the northernmost rail. Between the box and the track were three steps, each eight inches high; the edge of the lowest being about two feet from the rail. For a long time the custom had been to use the north track only for west-moving trains or locomotives, except when the south track, which was used by those going east, was obstructed. This custom was in accordance with a rule, of the existence of which the plaintiff knew by having some time before, while he was a car inspector, seen in a switch shanty a bulletin in which it was incorporated. A short time before the injury complained of the rule and practice in this respect had been reversed, but the plaintiff was not notified of the change, and had no knowledge of it. On the day of the accident, at about 11 o'clock in the morning, he was told to get ready to ice a tourist car which would be in shortly. He went to the east end of the ice box, where there was a rack for the purpose, and crushed a quantity of ice with which he filled a bucket, placing it in or near the box. He then walked to a point a little west of the box and waited for the car to arrive. While standing there, his foreman beckoned him from a place south of the tracks and east of where he stood, and pointed to the car which was to be iced. He walked between the ice box and the track to get his bucket of ice, reached it, took hold of it and started to carry it to the car, and while on the lowest step and about to proceed across the track he was struck by the tender of a locomotive which was backing east on the north track at the rate of 15 or 20 miles an hour without giving a signal of its approach and without keeping a lookout along the track. The track was straight for a quarter of a mile west. It was a clear day, and there was nothing to have prevented the plaintiff from seeing the engine and tender if he had looked. It is, there-

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fore, manifest that the plaintiff's omission to exercise due caution in his own behalf was fatal to his recovery unless there was something in the peculiar circumstances of the case to take it out of the general rule, which is thus stated in 23 A. & E. Encycl. of L. (2d Ed.) 765: "Any one who goes upon or near a railroad track is bound, at his peril, to make diligent use of his senses of sight and hearing in order to detect the approach of trains; and if, in disregard to this duty to his own safety, he steps upon the track without looking or listening, * * * he is guilty of such negligence as to bar an action for the injury." One of the exceptions of the rule is stated by the same authority in these terms (*Id.*, p. 786): "Nor does the principle apply to employees whose duties require their presence upon the track, the performance of which duties necessarily precludes their paying the strictest attention to the approach of trains."

It is argued that the plaintiff in error falls within this exception. If he had been injured while standing upon the steps and engaged in breaking ice, this might be true, for the performance of that duty might have rendered it impracticable for him to keep a strict watch for passing trains, and if, while so engaged, any part of his body could come within the overhang of the cars or locomotives, the place was not a safe one to work in. But such was not the case. Whatever danger he might have been subjected to while filling his bucket with ice had passed. He had moved to a place of entire safety west of the ice box, and was awaiting an order to carry the ice to a car. When the order came, he had no duty for the time being but to get the bucket and carry it across the track to where the car stood. However great a degree of promptness or haste might have been expected of him, it was not essential that he should cross the track at any particular point, nor could his delaying until the engine and tender had passed have been material. He was simply in the position of one having occasion to get from one side of the track to the other. The necessity of his picking up the bucket before crossing did not preclude his glancing up the track to see if it was clear. The mere fact that he had habitually worked near the track and was under the frequent necessity of crossing it did not justify any relaxation of vigilance on his part. The tendency of the authorities seems rather to be to regard such circumstances as calling for the exercise of a higher degree of diligence than is expected of a pedestrian who is not an employee. In *Wabash R. R. Co. v. Skiles*, 64 Ohio St. 458, 60 N. E. 576, it is said: "It has been laid down as the law that passengers who are required to cross railroad tracks in getting upon or alighting from trains have the right, from the nature of their contract, to expect a safe place for that purpose, and may govern themselves accordingly; but such immunity has never been conceded to travelers upon a railroad crossing having equal rights there with the railroad company, and still

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less to employees in the yards or depots of the company. The latter have no invitation or implied contract, as passengers do have, to perform their duties in a safe place. The very nature of employment about the tracks of a railroad involves notice of the danger of it, and nobody knows better than an employee that other employees are liable to be careless in the observance of rules, and lax in the performance of duty. Therefore he cannot be permitted to shut his eyes to obvious dangers, and to act with 'full reliance' that rules will be observed, and a safe passage kept for him, whenever his duties call upon him to cross the tracks. He cannot be excused from the rule that ordinary prudence requires that a person in the full enjoyment of the faculties of seeing and hearing should use them when about to pass over a railroad track, and that the omission to do so is contributory negligence when it immediately results in an injury which might have been avoided if the injured person had looked or listened." Among other cases bearing more or less directly upon this proposition may be cited *Grand Trunk Ry. Co. v. Baird*, 94 Fed. 946, 36 C. C. A. 574; *Loring v. Kansas City, Ft. S. & M. R. Co.*, 128 Mo. 349, 31 S. W. 6; *Elliot v. Chicago, M. & St. P. Ry. Co.*, 5 Dak. 523, 41 N. W. 758, 3 L. R. A. 363; *Elliot v. Chicago, Milwaukee & St. Paul Railway Co.*, 150 U. S. 245, 14 Sup. Ct. 85, 37 L. Ed. 1068; *Abbot v. McCadden*, 81 Wis. 563, 51 N. W. 1079, 29 Am. St. Rep. 910; *Carlson v. Cincinnati, S. & M. R. Co.*, 120 Mich. 481, 79 N. W. 688; *St. Jean v. Boston & M. R. Co.*, 170 Mass. 213, 48 N. E. 1088; *Royskoyek v. St. Paul & D. R. Co.*, 76 Minn. 28, 78 N. W. 872; *Chicago, B. & Q. R. Co. v. Yost*, 56 Neb. 439, 76 N. Y. 901.

It is claimed that negligence cannot be imputed to the plaintiff for his failure to look along the track to the west, because, having had no notice of any change, he had a right to suppose that the old rule of using it under ordinary circumstances only for west-bound trains was still in force and would be observed. This consideration, however, did not relieve him from the burden of watchfulness on his own part. It is doubtful whether there was an obligation on the part of the company to give notice to the plaintiff of such a change. The information he had regarding the former rule was shown to have been acquired incidentally, and not to have been officially communicated to him as an employee. Of a somewhat similar question it is said in *L. S. & M. S. R. Co. v. Hart*, 87 Ill. 529: "In excuse for not using any precaution to ascertain whether there was any train approaching from the north, appellee urges the practice of the roads to run all trains south from Chicago on the Rock Island track, and all trains north, toward Chicago, on the Lake Shore track; and that therefore, in going upon the Lake Shore track, he was only bound to look south to see if any train was coming from that direction. Appellee was not justified in relying upon any such

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practice, as the result showed. The companies had the right to change such practice at any time, and to run their trains at all times in either direction, and any dependence upon such former practice was at appellee's risk. This practice before did not excuse the exercise of caution and vigilance in looking for approaching trains in both directions." But, if it was negligence to reverse the method of using the tracks without giving notice, the situation was no different from that presented by the company's sending an engine down the track in disregard of any existing rule, whether relating to direction, or speed, or lookout, or signal of warning, or of any precaution which a due regard for the safety of those about the yards might demand irrespective of formal regulations. If one about to cross a railroad track could rely implicitly upon the company's employees performing their full duty, and if such reliance would excuse the use of precaution for one's own protection, then there could be no room whatever for the application of the doctrine of contributory negligence. It is only when it has been established that the company has been negligent—that is, that some agent has omitted to do something which he should have done and which in a sense every one has a right to expect to perform—that any occasion arises to consider whether a person injured has himself been at fault.

Finally, it is contended in behalf of the plaintiff that, even admitting his own want of care to have been such as would ordinarily bar a recovery, still he had a right to submit to the jury the question whether the employees in charge of the engine by the use of reasonable diligence could not have discovered his negligence in time to avert the accident, and that an affirmative answer would have entitled him to a verdict. There is a general agreement in the authorities that, where an engineer actually sees a person in a position of danger and then fails to do what he reasonably can to prevent an accident, the railroad company is held responsible for the resulting injury, irrespective of the question of contributory negligence. A logical and sufficient reason for this holding is that such conduct on the part of the company's agent amounts to recklessness or wantonness, and is analogous to a willful and intentional wrong, and like a wrong of that character establishes a cause of action to which negligence of the injured party is no defense. This reason is not always given in decisions upon the point, perhaps not even generally, but it sometimes is. For example, in *Labarge v. Pere Marquette R. Co.*, 134 Mich. 139, 95 N. W. 1073, it is thus expressed: "Where one willfully injures another, the doctrine of contributory negligence is not involved, because the injury is not negligent, but intentional. Again, where one is seen in danger, though placed there through his own negligence, one who, thus

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seeing him, omits ordinary care to avert an injury to him, is not alone negligent, but is wanton, and, as wantonness of this kind is akin to willfulness, there is an opportunity for applying the same rule."

In a number of cases it has been held that if the engineer, by the exercise of reasonable diligence, could have learned that danger was imminent, but did not do so, the liability of the company will be determined in all respects as though he had in fact become aware of it; the constructive knowledge being apparently deemed the equivalent of actual knowledge. It is difficult or impossible to reconcile the decisions upon this and related questions, or to derive from them any generally accepted statement either of principle or result. Many of them are collected and discussed in chapter 9 of Thompson's Commentaries on the Laws of Negligence, especially in sections 222-247. There seems, however, to be no sufficient reason why the mere fact that a defendant is negligent in failing to discover a plaintiff's negligence, or his danger, should in and of itself exclude all consideration of contributory negligence. Take the not unusual situation of a train being negligently operated, let us say by being run at too high a speed and without proper signals of warning being given. Now, any one injured as a result of such negligence has *prima facie* a right to recover; but, if his own negligence has contributed to his injury then ordinarily, his right is barred. How is the situation altered if the railroad employees add to their negligence in regard to speed and signals the negligence of failing to keep a sufficient lookout? The negligence is of the same sort, and, if the contributory negligence of the person injured prevents a recovery when but the two elements of negligence are present, consistency requires that it should have the same effect, although a third element is added. If in the present case the plaintiff was entitled to recover in spite of his own negligence, it must be because the order of its occurrence with respect to that of the defendant made the latter the proximate cause of the injury. This, indeed, is his contention, and to support it reliance is placed upon the following text, which was quoted with approval in *Railway Co. v. Arnold*, 67 Kan. 260, 72 Pac. 857, and the substance of which is to be found also in volume 7 of *Encyclopædia*, at page 387: "And upon the principle that one will be charged with notice of that which by ordinary care he might have known, it is held that if either party to an action involving the questions of negligence and contributory negligence should, by the exercise of ordinary care, have discovered the negligence of the other, after its occurrence, in time to foresee and avoid its consequences, then such party is held to have notice, and his negligence in not discovering the negligence of the other, under such circumstances, is held the sole proxi-

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imate cause of a following injury." 7 Am. & Eng. Encycl. of L. p. 387. This may be accepted as a correct statement of a principle of universal application, according with both reason and authority, provided the words "after its occurrence" be interpreted to mean after the person concerned had ceased to be negligent. The rule that under the circumstances stated the neglect of one party to discover the omission of the other is to be held to be the sole proximate cause of a resulting injury is not an arbitrary, but a reasonable one. The test is, What wrongful conduct occasioning an injury was in operation at the very moment it occurred or became inevitable? If just before that climax only one party had the power to prevent the catastrophe, and he neglected to use it, the legal responsibility is his alone. If, however, each had such power and each neglected to use it, then their negligence was concurrent, and neither can recover against the other. As is said in the paragraph from which the foregoing quotation is made: "It is only when the negligence of one party is subsequent to that of the other that the rule can be invoked." In a note printed in volume 2 of the supplement to the Encyclopædia, at page 64, many recent cases are cited bearing on the subject, and it is said: "This so-called exception to the rule of contributory negligence (i. e., the doctrine of the last clear chance) will not be extended to cases where the plaintiff's own negligence extended up to and actually contributed to the injury. To warrant its application there must have been some new breach of duty on the part of the defendant subsequent to the plaintiff's negligence."

In the present case it may be granted that the negligence of the plaintiff began when he walked between the track and the ice box on the way to get the bucket, and that the employees in charge of the engine were themselves negligent in not discovering this negligence on his part, and the peril to which it exposed him, and taking steps to protect him. But his negligence, as well as theirs, continued up to the moment of the accident, or until it could not possibly be averted. His opportunity to discover and avoid the danger was at least as good as theirs. His want of care, existing as late as theirs, was a concurring cause of his injury and bars his recovery. This determination is entirely consistent with what Mr. Thompson in his work above cited (section 240) has styled the "last clear chance" doctrine, as is obvious from a consideration of the terms in which it is stated. As originally announced it was thus phrased: "The party who has the last opportunity of avoiding accident is not excused by the negligence of any one else. His negligence, and not that of the one first in fault, is the sole proximate cause of the injury." Mr. Thompson rewords it as follows: "Where both parties are negligent, the one that had the last clear op-

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portunity to avoid the accident, notwithstanding the negligence of the other, is solely responsible for it; * * * his negligence being deemed the direct and proximate cause of it." Expressions are to be found in the reports seemingly at variance with the conclusion here reached, but for the most part the decisions holding a defendant liable for failure to discover and act upon the plaintiff's negligence were made in cases which were, in fact, like *Railway Co. v. Arnold*, *supra*, or were decided upon the theory that they fell within the same rule. There the plaintiff's decedent while riding a bicycle was through his own fault run into by a street car. He clung to the fender, was carried some 75 feet, then fell under the wheels, and was killed. A judgment against the street car company was upheld only upon the theory that after he had reached a position of danger from which he could not extricate himself—that is, after his negligence had ceased—the defendant's employees were negligent in failing to discover his peril and stop the car. In *Robinson v. Cone*, 22 Vt. 213, 223, 54 Am. Dec. 67, the writer of the opinion says: "I should hesitate to say that if it appeared that the want of ordinary care on the part of the plaintiff, at the very time of the injury, contributed either to produce or to enhance the injury, he could recover, because it seems to me that is equivalent to saying that the plaintiff, by the exercise of ordinary care at the time, could have escaped the injury."

The principle thus intimated was embodied in a decision in *French v. Grand Trunk Ry. Co.* (Vt.) 58 Atl. 722, where it is said: "It is true that when a traveler has reached a point where he cannot help himself, cannot extricate himself, and vigilance on his part will not avert the injury, his negligence in reaching that position becomes the condition, and not the proximate cause, of the injury, and will not preclude a recovery; but it is equally true that if a traveler, when he reaches the point of collision, is in a situation to help himself, and, by a vigilant use of his eyes, ears, and physical strength, to extricate himself and avoid injury, his negligence at that point will prevent a recovery, notwithstanding the fact that the trainmen could have stopped the train in season to have avoided injuring him. In such a case the negligence of the plaintiff is concurrent with the negligence of the defendant, and the negligence of each is operative at the time of the accident. When the negligence is concurrent and operative at the time of the collision, and contributes to it, there can be no recovery.

To the same effect are these extracts: "There is no testimony suggesting negligence on the part of the driver that does not convict Doyle of an equal or greater degree of negligence. One had no better opportunity to anticipate the accident nor any better means of preventing it than the other. If, therefore,

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there was negligence, it was concurring negligence, continuous and mutual up to the instant of the accident, which disentitles the plaintiff to recover." *Consumers' Brewing Co. v. Doyle's Adm'x*, 102 Va. 403, 46 S. E. 391. "In numerous cases it has been held that the plaintiff's conduct is not contributory negligence, if, notwithstanding his negligence, the injury could have been avoided by the use of ordinary care by the defendant. That rule prevails when the plaintiff is in a position of threatened contact with some agency, under the control of the defendant, when the plaintiff cannot, and the defendant can, prevent the injury. It does not apply where both parties are contemporaneously and actively in fault, and by their mutual carelessness an injury ensues to one or both of them. The rule does not apply where, as in the case before us, the negligence of the party injured continues up to the moment of the injury, and was a contributing cause thereof." *Robards v. Indianapolis St. Ry. Co.* (Ind. App.) 67 N. E. 953. "The plaintiff must show that at some point of time, in view of the entire situation, including the plaintiff's negligence, the defendant was thereafter culpably negligent, and its negligence the latest in the succession of causes. In such case the plaintiff's negligence would not be the proximate cause of the injury. * * * The plaintiff not only negligently put himself in a place of peril, but continued negligently to move on to the catastrophe until it happened. The language of the doctrine of prior and subsequent negligence implies that the principle is not applicable when the negligence of the plaintiff and that of the defendant are practically simultaneous." *Butler v. Rockland, etc., St. Ry. Co.*, 99 Me. 149, 58 Atl. 775, 105 Am. St. Rep. 267.

In *Green v. Los Angeles, etc., Ry. Co.*, 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68, it is said of the rule holding the plaintiff liable notwithstanding the contributory negligence of plaintiff: "It applies in cases where the defendant, knowing of plaintiff's danger, and that it is obvious that he cannot extricate himself from it, fails to do something which it is in his power to do to avoid the injury. It has no application, however, to a case where both parties are guilty of concurrent acts of negligence, each of which, at the very time when the accident occurs, contributes to it." Of the same rule it is said in *O'Brien v. McGlinchy*, 68 Me. 552: "This rule applies usually in cases where the plaintiff, or his property, is in some position of danger from a threatened contact with some agency under the control of defendants, when the plaintiff cannot, and the defendant can, prevent the injury. * * * But this principle cannot govern where both parties are contemporaneously and actively in fault, and by their mutual carelessness an injury ensues to one or both of them." In *Smith v.*

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Railroad, 114 N. C. 728, 755, 19 S. E. 863, 923, 25 L. R. A. 287, the general rule is thus concretely stated: Applying the rule which we have stated to accidents upon railroad tracks, it may be illustrated as follows: First. There must be a duty imposed upon the engineer, as otherwise there can be no negligence to which the negligence of the injured party is to contribute. The duty under consideration is to keep a vigilant lookout in order to discover and avoid injury to persons who may be on the track and who are apparently in unconscious or helpless peril. When such a person is on the track and the engineer fails to discover him in time to avoid a collision, when he could have done so by the exercise of ordinary care, the engineer is guilty of negligence. The decisive negligence of the engineer is when he has reached that point when no effort on his part can avert the collision. Hence, if A., being on the track and after this decisive negligence, fails to look and listen, and is in consequence run over and injured, his negligence is not concurrent merely, but really subsequent to that of the engineer, and he cannot recover, as he, and not the engineer, has 'the last clear opportunity of avoiding the accident.' If, however, A. is on the track, and while there, and before the decisive negligence of the engineer, he by his own negligence becomes so entangled in the rails that he cannot extricate himself in time to avoid the collision, and his helpless condition could have been discovered had the engineer exercised ordinary care, then the negligence of A. would be previous to that of the engineer, and the engineer's negligence would be the proximate cause; he, and not A., having the last clear opportunity of avoiding the injury. The same result would follow in the case of a wagon negligently stalled, when no effort of the owner could remove it, and there are other cases to which the principle is applicable." The principle running through these cases is reasonable, is consistent with the general rules that have met with practically universal acceptance, and, if adhered to, will correct a part of the confusion now attending the application of the law of contributory negligence.

The judgment is affirmed. All the Justices concurring.

BOWERS *v.* EAST TENNESSEE & W. N. C. R. Co.

(Supreme Court of North Carolina, May 27, 1907.)

[57 S. E. Rep. 453.]

Negligence—Fires—Proximate Cause.*—A fire started in a building some distance from plaintiff's hotel, for which defendant railroad company was not responsible. The fire burned several buildings and spread to and burned certain piles of lumber on and along defendant's right of way, from which piles it spread to plaintiff's hotel and destroyed it. Held, that defendant's negligence, if any, in permitting such lumber to be piled on its right of way adjacent to plaintiff's hotel, was not the proximate cause of the burning of the hotel.

Appeal from Superior Court, Mitchell County; Moore, Judge.

Action by V. B. Bowers against the East Tennessee & Western North Carolina Railroad Company for damages for the alleged negligent burning of plaintiff's hotel building. Plaintiff was nonsuited, and he appeals. Affirmed.

Avery & Avery, L. D. Lowe and T. A. Lovc, for appellant.
S. J. Erwin, for appellee.

BROWN, J. All the evidence tends to prove that the plaintiff was the owner of a hotel building located to the south of defendant's track, which was destroyed by fire on the night of December 23, 1903. The fire originated in the Manning & Ellis building, some distance from the hotel, and on the north side of the track, and burned that building and several others on the same side of the track before reaching the latter, and there spread to and burned piles of lumber on and along the defendant's right of way, and then spread from the lumber to the hotel and destroyed it. There is a public street in the town of Elk Park which crosses the railroad track between the Manning & Ellis building and the hotel. The former building was situated some little distance to the east of said street and the hotel to the west of it, as we gather from the map filed with the record. A fraternal society—the Odd Fellows—had a supper in the

*For the authorities in this series on the question, what is, and is not, the proximate cause of an injury, see foot-notes appended to *New York, etc., Ry. Co. v. Hamlin (Ind.)*, 22 R. R. R. 701, 45 Am. & Eng. R. Cas., N. S., 701; foot-notes appended to *Hanson v. Manchester St. Ry. (N. H.)*, 22 R. R. R. 675, 45 Am. & Eng. R. Cas., N. S., 675; foot-notes appended to *Elgin, etc., Ry. Co. v. Hoadley (Ill.)*, 22 R. R. R. 663, 45 Am. & Eng. R. Cas., N. S., 663; *Indianapolis, etc., Co. v. Kidd (Ind.)*, 22 R. R. R. 366, 45 Am. & Eng. R. Cas., N. S., 366; *Hudson v. Atlantic Coast Line R. Co. (N. Car.)*, 22 R. R. R. 305, 45 Am. & Eng. R. Cas., N. S., 305.

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Manning & Ellis building, where the fire originated, on the night on which the fire occurred, but the origin of the fire was unknown, whether accidental or by design; but it was conceded that the defendant was not responsible for the fire, and no testimony was offered tending to show that it was. The plaintiff contends (1) that the defendant negligently suffered large stacks of lumber and quantities of tan bark to be placed by its patrons for shipment on its right of way and partly in the adjacent street, and suffered the same to accumulate; that the fire was communicated to such material and thence to his hotel; (2) that such alleged negligence was the proximate cause of his injury.

It is not necessary that we discuss or determine whether or not it is negligence on the part of a common carrier operating a railroad and engaged in transporting lumber to market to allow or permit its patrons engaged in shipping lumber to deposit such lumber on its right of way and near its track with a view to loading such lumber upon its cars. Assuming, for the sake of the argument only, that such acts constitute negligence, then the question arises: Is this negligence the proximate cause of the destruction of the plaintiff's hotel, the fire having originated in a remote building, without fault on the part of the defendant, either by accident or by the design or negligence of third persons, and having spread thence to several other buildings, one after the other, and thence carried to the lumber and from the lumber to the hotel? We do not think that under the well-established principles of law the defendant can be held proximately responsible to the plaintiff for the unfortunate consequences of such a conflagration. That the burning of the lumber caused the destruction of the hotel and was the remote cause of plaintiff's injury does not subject the defendant to liability. The maxim of the law is, "In jure non remota causa sed proxima spectatur," of which Lord Bacon says: "It were infinite for the law to consider the causes of causes, and their impulsions one of another. Therefore it contenteth itself with the immediate cause, and judgeth of acts by that without looking to any further degree." Maxims, Reg. 1, quoted in Broom's Maxims, 216.

No exact rule for determining when causes are proximate and when remote has yet been formulated. But the general principles which govern the determination of the question appear to be quite well settled. In *Ramsbottom v. Railroad*, 138 N. C. 41, 50 S. E. 448, an oft-quoted case, Mr. Justice Hoke defines the proximate cause, which is an essential ingredient of actionable negligence, as "a cause that produced the result in continuous sequence and without which it would not have occurred, and one from which any man of ordinary prudence could have foreseen that such a result was probable under all the facts as they existed." See, also, *Raiford v. Railroad*, 130 N. C. 597, 41 S. E.

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806; *Pittsburgh v. Taylor*, 104 Pa. 306, 49 Am. Rep. 580. In *Brewster v. Elizabeth City*, 137 N. C. 395, 49 S. E. 885, it is said: "The first requisite of proximate cause is the doing or omitting to do an act which a person of ordinary prudence could foresee might naturally and probably produce the injury complained of, and the second requisite is that such an act or omission did actually cause the injury." In *Schwartz v. Shull*, 45 W. Va. 405, 31 S. E. 914, it is said that the proximate cause of an injury is the last negligent act contributing thereto and without which the injury would not have resulted. The Am. & Eng. Enc. describes it as a cause which operates to produce particular consequences without the intervention of any independent unforeseen cause without which the injuries would not have occurred. 21 Am. & Eng. Enc. p. 485. And, again, it says that it is not a proximate cause of the injury when the negligence of the person who actually inflicted it is a more immediate and efficient cause. 7 Am. & Eng. Enc. p. 384. See, also, *Railway v. Kellogg*, 94 U. S. 475, 24 L. Ed. 256.

It seems from the authorities that there are two very essential elements in the doctrine of proximate cause: (1) It must appear that the injury was the natural or probable consequence of the negligent or wrongful act; (2) that it ought to have been foreseen in the light of attending circumstances. Applying these general principles to the facts of this case, we have no difficulty in approving the ruling of the court below. It is plain that the original first cause of the destruction of the hotel was the burning of the Manning & Ellis building, but for which the plaintiff's property would not have been destroyed. Whether done accidentally, negligently, or wantonly, it is conceded the defendant is not responsible for it. The wind carried the fire in the direction both of the track and of the hotel, which caused the destruction of several other houses before it reached the track. The burning of the intervening houses was as much the cause of the destruction of the hotel as was the burning of the lumber. Neither was the immediate and efficient cause. Nor can the rule of "contemplated consequences" be extended to a case like this. The language of the Supreme Court of Pennsylvania in *Morrison v. Davis*, 20 Pa. 171, 57 Am. Dec. 695, is peculiarly applicable to the facts of this case. "In any other than a carrier's case," says the court, "this question would present no difficulty. The general rule is that a man is answerable for the consequences of a fault only so far as the same are natural and proximate, and as may on this account be foreseen by ordinary forecast, and not those which arise from a conjunction of his fault with other circumstances of an extraordinary nature." Again: "Now, there is nothing in the policy of the law relating to common carriers that calls for any different rule as to consequential

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damages to be applied to them. They are answerable for the ordinary and proximate consequences of their negligence, and not for those that are remote and extraordinary." See, also, *Extinguisher Co. v. Railroad*, 137 N. C. 278, 49 S. E. 208; *Cooley on Torts*, 68-71; *Whitson v. Wrenn*, 134 N. C. 86, 46 S. E. 17; *Williams v. Railroad*, 119 N. C. 746, 26 S. E. 32.

The defendant's officers and agents must have been endowed with more than ordinary human prescience could they have foreseen such extraordinary results as naturally and probably flowing from the piling of lumber and the storing of tan bark on the right of way. The class of cases wherein railroad companies have been held responsible for fires originating on their rights of way have no application here. In the case of *Moore v. Railroad*, 124 N. C. 338, 32 S. E. 710 which, in some of its features is very similar to this, there was evidence tending to show a foul right of way, that the fire originated on the right of way from defendant's engine, and also evidence that it originated off of the right of way, and, setting fire to the foul matter on it, burned plaintiff's property. After discussing the circumstances under which the defendant would not be liable in case of fire, this court said, in reference to the contention that the fire had originated off the right of way: "Or if the fire originated outside the right of way from some other cause and communicated itself to the right of way, and then to the plaintiff's premises, the defendant would not be chargeable with negligence." This case is cited with approval in *Williams v. Railroad*, 140 N. C. 625, 53 S. E. 448, and *Insurance Co. v. Railroad*, 132 N. C. 78, 43 S. E. 548.

Upon a review of the record, we find his honor committed no error in allowing the motion to nonsuit, and his judgment is affirmed.

HOKÉ, J., did not sit.

EDGAR *et al.* v. RIO GRANDE WESTERN RY. CO.

(Supreme Court of Utah, June 5, 1907.)

[90 Pac. Rep. 745.]

Master and Servant—Injuries to Servant—Sufficiency of Evidence—Negligence of Master.*—In an action against a railway for the death of a fireman, caused by the engine running into an open switch, where the evidence leaves it uncertain as to whether defendant or some unknown party was responsible for leaving the switch open, a recovery cannot be had on that ground.

Same—Acts Constituting Negligence—Proximate Cause.†—Where a locomotive fireman was killed by the engine running into an open switch, which defendant had left unlocked, though its responsibility for leaving it open was not shown, leaving the switch unlocked was not a proximate or concurring cause of the injury.

Appeal from District Court, Third District; George G. Armstrong, Judge.

Action by Jennie Edgar and others against the Rio Grande Western Railway Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

This action was brought by the heirs at law of George Edgar, deceased, to recover damages from defendant company for the alleged wrongful death of deceased, which occurred on the 5th day of July, 1905, at Park City, Utah. The complaint alleges that the deceased, on and prior to July 5, 1905, was a fireman in the employ of defendant company, and that on said day the engine on which he was riding was derailed by running into an open switch, thereby causing said engine to tip over and fall on its side, and thereby causing the death of said deceased, who was caught under the engine as it fell. It is further alleged "that said defendant company negligently and carelessly failed to keep said switch closed, in proper and safe condition so that cars would not leave the rails when passing over the same, and negligently failed to keep said switch locked, and negligently

*See foot-notes appended to *Looney v. Metropolitan, etc., R. Co.* (U. S.), 18 R. R. R. 617, 41 Am. & Eng. R. Cas., N. S., 617; foot-notes appended to *Stewart v. Raleigh, etc., R. Co.* (N. Car.), 22 R. R. R. 572, 45 Am. & Eng. R. Cas., N. S., 572; foot-notes appended to *Norfolk & W. Ry. Co. v. McDonald's Adm'x* (Va.), 22 R. R. R. 101, 45 Am. & Eng. R. Cas., N. S., 101; *Vißman v. Southern Ry. Co.* (Ky.), 22 R. R. R. 57, 45 Am. & Eng. R. Cas., N. S., 57; *St. Louis, etc., R. Co. v. Hill* (Ark.), 21 R. R. R. 20, 44 Am. & Eng. R. Cas., N. S., 20.

†For the authorities in this series on the question what is, or is not, the proximate cause of an injury, see preceding case, and foot-notes.

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left said switch unlocked and open, and negligently failed to supply said switch with proper and safe signals, in that the signal maintained at said switch by said defendant company was too small, and the paint on the same was worn off and dingy and was dim and small, and that the same could not be seen by the said engineer or the said George Edgar, deceased, when employed as aforesaid in said engine." The answer of the defendant denies the negligence alleged in the complaint, and alleges that deceased was guilty of contributory negligence and that he assumed the risk of injury to himself in the manner alleged in the complaint. At the conclusion of the plaintiff's evidence the court, on motion of defendant, granted a nonsuit. A motion for a new trial having been made and overruled, plaintiffs thereupon appealed to this court from the judgment of nonsuit.

The facts, as developed by the record, are as follows:

The deceased, at the time of the accident mentioned in the complaint, was, and for five years prior thereto had been, a locomotive fireman on the Park City branch of the defendant's railroad. The train on which he was employed was the regular passenger train running between Salt Lake City and Park City daily. The train left Salt Lake City each morning, and arrived at Park City at 10:50 o'clock in the forenoon, and departed daily on its return trip to Salt Lake City at 3:20 o'clock in the afternoon. This was the schedule run on July 5, 1905, the day on which the deceased met his death. On this day this particular train, in the switching operations, before it started on its return trip to Salt Lake City was run back and forth over the switch in question three times; the last time being about 11 o'clock in the forenoon. Each time when the train passed, the switch and rails were in proper condition and were set and aligned for the safe passage of trains over the main line. After passing over the switch for the last time, the train was backed southward to the defendant's depot building, and there stopped, with the engine facing towards the north, ready to start for Salt Lake City at the usual time. The switch in question was about 1,000 feet distant in a northerly direction. When the train pulled out, and had reached a point about 150 feet from the switch, the engineer, Joseph W. Bywater, for the first time noticed there was a break in the rails at that point, and he shouted to the deceased, "Jump, George! the switch is wrong," and at the same time set the brake, reversed the engine, and opened its throttle. The deceased, when thus warned of the danger, leaped from the engine. The train could not be stopped, and as a result thereof the engine ran into the open switch, was derailed, and turned over onto its side, with the fireman, George Edgar, underneath, thereby crushing him to death.

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The switch stand used to manipulate this switch was a rotary or revolving stand, and stood 5 or 6 feet from the rails, and was used to throw the rails from one track to the other. It consisted of a pedestal of cast iron spiked or bolted to a tie which extended out from the track. There was a lever attached to the top above the pedestal, and on the pedestal was a disk, with slots in it, to permit the reception of the lever. By means of this lever the disk was revolved, and the lever dropped into one or the other of two slots. When the lever was in one position, the alignment of the rails was properly made for the main line, and when in another the continuity of the rails would cause a train going south to run onto a side track called the "house track." On this point Bywater, the engineer, testified in part as follows: "When the lever is there [in a slot] it is absolutely safe, even if the lock were unlocked. No train running over the rails could throw it out. * * * I cannot recollect the exact amount of power required to lift it out of the south slot and then bring it around and drop it into the west slot. It requires an ordinary pull for a man to pull it around. I should say an exertion of probably 50 or 75 pounds—that would do it, I think. The force to pull this lever from the south clutch to the west clutch must move the rails." An indicator or disk, consisting of sheet iron and about 10 or 12 inches in diameter, was attached to the switch stand. There was also a sheet iron or steel arrow, 12 or 14 inches in length, which indicated the position of the rails. This arrow pointed in the direction in which the rails extended when adjusted or moved by the switch. When the arrow is at right angles with the main track, it means that the switch is turned, and that the continuity of the rails on the main line is broken. The switch in question was about 1,000 feet from the Park City depot, and the disk or target, as well as the arrow, could, with the exception of a short distance, be seen by the fireman from the time the train left the depot until it arrived at the switch. The deceased was familiar with this switch and knew how it was manipulated. On this point Bywater, the engineer, testified as follows: "I have been running as locomotive engineer on the Park City branch about six years. Mr. Edgar fired for me nearly five years, and was on duty practically all of the time. Each time we went up to Park City on the engine he passed this switch. * * * Except for a few days he was laying off, Mr. Edgar passed that switch every day in the year, including Sundays, for five years. He knew what kind of a switch stand it was. * * * We would pass it six or eight times a day with Mr. Edgar on the engine. * * * I have seen him unlock that switch and manipulate it on numerous occasions prior to the accident." Oscar Cunningham, a boy eight years of age, testified that he passed by the switch stand between

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8 and 9 o'clock in the morning of the day of the accident and that he observed that the lock in the switch stand was unlocked; that he removed the lock, examined it, and then replaced it in its proper position.

The members of the different train crews on this branch road and all station employees were furnished with keys which would lock and unlock said switch. The evidence, however, shows that none of the train crews of the train in question used, or had occasion to use, the switch, or to unlock or manipulate it, on the day of the accident, nor for three or four days prior thereto. Bywater, the engineer, testified: "From the last time we backed up to the depot platform there was not, to my knowledge, a Rio Grande Western employee in Park City that day that had any duty to perform about that switch. My engine was the only Rio Grande engine there, and if there had been any cars to be handled, to be put on the house track there at all, it would have to be done by my engine. Our crew was the only train crew there besides the agent. No member of my crew had any duty to perform about or around the switch after we passed it at 11 o'clock. All our work was over the main line. All that was necessary for us to do was to leave the switch as we first found it in the morning, in order to do what we had to do." It further appeared that some three years prior to the date of the accident the defendant company had furnished the agent of the Union Pacific Railway Company at the Park City station a key to said switch, and gave the said Union Pacific Railway Company permission to use said switch and the railroad tracks of defendant company in transferring cars from one road to the other, and about 9 o'clock on the morning of July 5, 1905, the day on which the accident occurred, the employees of the Union Pacific Railway Company procured the key from the agent, and, after using the switch and tracks in question, returned the key to the agent at about 9:30 o'clock that same forenoon.

Warner & Davis, for appellants.

Sutherland, Van Cott & Allison and *W. D. Riter*, for respondent.

MCCARTY, C. J., after stating the facts, delivered the opinion of the court.

While it is alleged in the complaint, that the respondent (defendant company) failed to keep and maintain, at the switch where the accident occurred which caused the death of the deceased, George Edgar, proper signals indicating whether the switch was opened or closed, no evidence was offered in support of this allegation; but, on the contrary, the evidence introduced with respect to the indicators, which consisted of a disk and

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arrow attached to the switch stand, tended to show that they in every respect fully answered the purposes for which they were intended, and that the accident was in no manner due to their alleged imperfect condition. In fact, the evidence, as the record now stands, shows that the switch stand and the tracks with which it was connected were in good condition and in perfect working order. We shall therefore confine our consideration of the case to the question as to whether or not the position of the switch at the time of the accident was due to the negligence of respondent company.

While it may be fairly inferred from the evidence that some person in the employ of the respondent, or some party to whom it had intrusted one of its keys to the switch, left the switch unlocked, yet there is a total want of evidence to support a finding that the switch was left open either by respondent or by any person who, with respondent's consent, used the switch or carried one of the keys thereto. The only use made of the track in question on the day of the accident, after the train on which the deceased was fireman reached Park City and before it started on its return trip to Salt Lake City, was in the switching operations of this particular train, during which time it passed over the switch where the derailment took place three times; the last time being about 11 o'clock in the forenoon. On this point witness Bywater testified, and his testimony is not disputed: "We passed that switch before the accident on that day about three times, and everything appeared to be all right. The rails were continuous for the main line on each of these occasions. Before the accident we passed over the switch about 11 o'clock the last time, and the rails were safe for the passage of the train. There was nothing to indicate that there was anything wrong with the track." And again he says, referring to the switch: "I did not manipulate it on that day at all. We had no occasion to use the house track on that day. * * * All our work was done over the main line."

Counsel for appellants, in their brief, say: "It is certain that the switch was open. It is equally certain that some one was responsible for its condition. From this evidence there must be one of three inferences deduced as to who was responsible for the open switch. It was either the defendant company, the deceased, or some third person. One or the other of these inferences must necessarily arise from the proven facts that the switch was unlocked and that the switch was open." And then, by way of argument, they say: "While it might be said that either one inference or the other might be deduced from the evidence by a reasonable person, still it seems to us that the inference that the defendant company was responsible is the more reasonable." It will be seen that it is practically conceded that

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the question as to whether defendant company or some other party left the switch open is a matter of conjecture and speculation. The evidence to which we have referred, however, instead of pointing to either defendant company or to the deceased, rather tends to show that neither of them was responsible for the open switch. Therefore the allegation in the complaint that the defendant left the switch open remains wholly unproved. It was not sufficient for appellants to show that defendant company may have been guilty of this particular act of negligence. It was incumbent upon appellants to produce some substantial evidence which would at least tend to fasten the blame on defendant for the misplaced switch which caused the accident. Where, as in this case, the evidence leaves the matter uncertain as to whether the defendant or some unknown party is responsible for the act of negligence alleged, a recovery cannot be had. In the case of *Patton v. Texas & P. R. Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361, Justice Brewer, speaking for the court says: "It is not sufficient for the employee to show that the employer may have been guilty of negligence. The evidence must point to the fact that he was. And where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion." 2 Labatt. Mast. & Serv. 837; *Fritz v. Electric Light Co.*, 18 Utah, 493, 56 Pac. 90; *Sorenson v. Menasha Paper & Pulp Co.*, 56 Wis. 338, 14 N. W. 446; *Deserant v. Coal R. Co.*, 55 Pac. 290, 9 N. W. 495; *Shaw v. New Year Gold Min. Co.*, 77 Pac. 515, 31 Mont. 138; *Dobbins v. Brown et al.*, 119 N. Y. 188, 23 N. E. 537.

The important question, therefore, is: Was the leaving of the switch unlocked the proximate cause of the derailment of the engine in question? We think this question must be answered in the negative. The evidence, we think, conclusively shows that the unlocked condition of the switch was not the proximate cause of the death of the deceased, nor did it in any manner contribute thereto. The record shows that, before the continuity of the rails on the main line was broken by the misplacement of the switch between 11 o'clock a. m. and 3:20 o'clock p. m. on the day in question, the main track where it passed the switch was "absolutely safe, even if the lock were unlocked, so far as the trains passing over it was concerned"; that "no train running over the rails could throw it out"; and that it would require an exertion equivalent to from "50 to 75 pounds" to throw open the switch and thereby

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break the continuity of the rails on the main line. Under these conditions it is evident that the unlocking of the switch and leaving it in that condition could not in any degree have rendered the track dangerous or unsafe for the passage of trains; for, had it not been for the subsequent and independent act by which the switch was turned and the continuity of the rails on the main track thereby broken, the accident in all probability would not have happened. In other words, there was not such an unbroken connection between the leaving of the switch unlocked and the subsequent misplacement of the rails as to make it one continuous operation. And even if it be assumed, for the purposes of this case, that the unlocking of the switch in the first instance was a cause without which the accident would not have occurred, it was at most a remote cause; the direct and proximate cause of the accident being the subsequent misplacement of the switch.

The law is well settled that an act or omission, in order to constitute negligence for which an action will lie, must directly, as its natural consequence, produce injury to another. Cooley, in his work on Torts (2d Ed., pp. 73-76), says: "It is not only requisite that damage actual or inferential, should be suffered, but this damage must be the legitimate sequence of the thing amiss. The maxim of the law here applicable is that in law the immediate, and not the remote, cause of any event is regarded, and in the application of it the law rejects, as not constituting the foundation for an action, that damage which does not flow proximately from the act complained of. In other words, the law always refers the injury to the proximate, not the remote cause. The explanation of this maxim may be given thus: If an injury has resulted in consequence of a certain wrongful act or omission, but only through or by means of some intervening cause, from which last cause the injury followed as a direct and immediate consequence, the law will refer the damage to the last proximate cause, and refuse to trace it to that which was more remote." Continuing, the author says: "A writer on this subject has stated the rule in the following language: If the wrongs and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action." In the case of *Insurance Co. v. Boon*, 95 U. S. 130, 24 L. Ed. 395, it is said: "The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones." In the case of *Railway Co. v. Kellogg*,

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94 U. S. 469, 24 L. Ed. 256, the court says: "The question always is: Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? * * * It is generally held that in order to warrant a finding that negligence, or an act not amounting to a wanton wrong, is the proximate cause of the injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of attending circumstances." *Goodlander Mill Co. v. Standard Oil Co.*, 63 Fed. 400, 11 C. C. A. 253, 27 L. R. A. 583; *Bailey on Mast. Liab. to Serv.* p. 420; *Cole v. German Sav. & Loan Soc.*, 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416; *Claypool v. Wigmore*, 71 N. E. 509, 34 Ind. App. 35; *Smith v. County Court (W. Va.)*, 8 L. R. A. 82, and cases cited in note; *Afflick v. Bates*, 43 Atl. 539, 21 R. I. 281.

Applying the law as declared by the foregoing authorities to the facts in this case, we are clearly of the opinion that the leaving of the switch unlocked was not the proximate cause, nor was it a concurring cause, of the accident; and, as the evidence fails to show that the defendant company displaced and left the switch open on the occasion referred to, the trial court did not err in granting defendant's motion for a nonsuit.

The judgment is affirmed, with costs.

FRICK, J., concurs.

BRUNSWICK & B. R. CO. *v.* HOODENPYLE.

(Supreme Court of Georgia, Aug. 8, 1907.)

[58 S. E. Rep. 705.]

Railroads—Frightening Horses—Unusual Noises.*—A railway company is not legally responsible for producing noises which are unusual, or greater than is customary in the running of its locomotive and cars, unless such noises are unnecessary. *Morgan v. Central Railroad*, 77 Ga. 788; *Georgia Railway & Electric Co. v. Joiner*, 120 Ga. 905, 48 S. E. 336, and citations.

Where, however, a petition alleged, in substance, that those in charge of a locomotive being operated on the road of the defendant company caused great and unusual volumes of steam to be suddenly emitted from the locomotive, which made a loud and unusual noise, and enveloped plaintiff's horse, being driven near by on a public street of a city, thereby greatly frightening the animal; that by reason of the attempt of the horse in its fright to run away, and the endeavor of plaintiff's driver to prevent it, a portion of the wagon was backed upon defendant's track; that, notwithstanding those in charge of the locomotive saw the wagon on the track, the frightened condition of the horse, the inability of the driver to control the animal, and the great peril of plaintiff, who, on account of a sudden

*See foot-notes appended to *Everett v. Great Northern Ry. Co.* (Minn.), 23 R. R. R. 259, 46 Am. & Eng. R. Cas., N. S., 259; *Louisville & N. R. Co. v. Sights* (Ky.), 21 R. R. R. 856, 44 Am. & Eng. R. Cas., N. S., 856; *Alabama Great So. R. Co. v. Fulton* (Ala.), 20 R. R. R. 311, 43 Am. & Eng. R. Cas., N. S., 311 (negligence in trainmen to cause engine to make unusual noise after seeing train near track); *Foster v. East Jordan Lumber Co.* (Mich.), 20 R. R. R. 282, 43 Am. & Eng. R. Cas., N. S., 282; *Choctaw, etc., R. Co. v. Coker* (Ark.), 19 R. R. R. 159, 42 Am. & Eng. R. Cas., N. S., 159; *Fares v. Rio Grande Western R. Co.* (Utah), 13 R. R. R. 76, 36 Am. & Eng. R. Cas., N. S., 76; *Louisville & N. R. Co. v. Howerton* (Ky.), 7 R. R. R. 554, 30 Am. & Eng. R. Cas., N. S., 554; *Chicago, etc., R. Co. v. Roberts* (Neb.), 6 R. R. R. 277, 29 Am. & Eng. R. Cas., N. S., 277; *Hendricks v. Fremont, etc., R. Co.* (Neb.), 6 R. R. R. 281, 29 Am. & Eng. R. Cas., N. S., 281; *Louisville & N. R. Co. v. Penrod's Adm'r* (Ky.), 1 R. R. R. 887, 24 Am. & Eng. R. Cas., N. S., 887; *Texas & P. Ry. Co. v. Hamilton* (Tex.), 1 R. R. R. 884, 24 Am. & Eng. R. Cas., N. S., 884; *Gulf, etc., Ry. Co. v. Milner* (Tex.), 1 R. R. R. 607, 24 Am. & Eng. R. Cas., N. S., 607; *Lake Shore & M. S. Ry. Co. v. Butts* (Ind.), 1 R. R. R. 898, 24 Am. & Eng. R. Cas., N. S., 898; *Boothby v. Boston & M. R. R.* (Me.), 8 Am. & Eng. R. Cas., N. S., 299; *Philadelphia, etc., R. Co. v. Burkhardt* (Ind.), 5 Am. & Eng. R. Cas., N. S., 189; *Ochiltree v. Chicago, etc., Ry. Co.* (Iowa), 9 Am. & Eng. R. Cas., N. S., 230; *Ohio Val. R. Co.'s Receiver v. Young* (Ky.), 8 Am. & Eng. R. Cas., N. S., 399; *Central of Georgia Ry. Co. v. Black* (Ga.), 23 Am. & Eng. R. Cas., N. S., 864; *Dewey v. Chicago, etc., Ry. Co.* (Wis.), 11 Am. & Eng. R. Cas., N. S., 275; note, 5 Am. & Eng. R. Cas., N. S., 285.

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jerk of the wagon by the horse in its fright, had fallen down in the wagon and was unable to extricate himself from the contents of the vehicle and alight therefrom, and though the locomotive was being run so slowly that it could easily have been stopped before reaching the wagon, such employees made no effort to stop the locomotive, but ran the same against plaintiff's wagon before the horse could be made to pull it from the track, thereby violently throwing plaintiff to the ground and greatly injuring him in the particulars described; and that the defendant company was not only negligent because of the emitting of the steam in the manner and under the circumstances set forth, but was also negligent because of the failure to stop the locomotive before it struck the wagon—held, that the petition was not open to general demurrer on the ground that it did not allege that the noise made by the escaping steam was unnecessary.

Error, Writ of—Record—Review—Rulings on Evidence.—Even if in any event the asking of leading questions and the admission of the answers thereto is cause for a new trial, the mere propounding of such questions is not, when it does not appear what, if any, were the answers thereto. *City of Rome v. Stewart*, 116 Ga. 738, 42 S. E. 1011, and citations. See, also, *Phinazee v. Bunn*, 123 Ga. 230, 51 S. E. 300.

Evidence—Hearsay.—When the plaintiff, upon being asked why he left a place where he was being treated by specialists, answered, "Because they could do nothing for me," the answer was not objectionable as being hearsay.

Writ of Error—Assignments of Error—Objections to Evidence.—An assignment of error upon the admission of specified evidence as a whole was not well taken when some of such evidence was admissible. *Collins Park R. Co. v. Ware*, 112 Ga. 663, 37 S. E. 975 (3).

Evidence—Opinion Evidence.—"The opinion of a witness is not admissible in evidence when all the facts and circumstances are capable of being clearly detailed and described so that the jurors may be able readily to form correct conclusions therefrom." *Mayor of Milledgeville v. Wood*, 114 Ga. 370, 40 S. E. 239; *O'Neill Mfg. Co. v. Harris*, 127 Ga. 640, 56 S. E. 739, and cases cited.

Error, Writ of—Review.—Where the opinion of a witness, under the rule just stated, was inadmissible, the ruling of the court in rejecting it will be sustained, though based on another and insufficient, or even wrong, reason.

Appeal—Review.—It was not cause for a new trial that the court declined to permit the defendant's counsel, on cross-examination of the plaintiff, to propound to him the following question: "Did you not notice this locomotive pop off down there half an hour before that?" Even if the question had been allowed and had been answered in the affirmative, the answer would not have shown that the locomotive was then emitting steam in the same manner and in such volumes as it was when plaintiff's horse was frightened.

Brunswick & B. R. Co. v. Hoodenpyle

Trial—Remarks of Court.—The court did not err in stating the contentions of the plaintiff. This is especially clear in view of the amendment to the petition, the effect of which was to make it allege that the defendant company owned, and, at the time of the occurrence complained of, was operating on its track, the engine and car which struck the plaintiff.

Same—Instructions.—The instructions of the court to the jury as to the contentions of the defendant were not such as to lead “the jury to infer that defendant admitted causing the accident and the consequent injury to plaintiff.” Nor were these instructions such as to place “upon defendant a burden not imposed by the declaration nor the law”; that is, of showing that the noise made by the escaping steam was necessary.

Railroads—Injuries at Crossing—Instructions.—The court charged: “So that when an injury is shown to have been sustained by a person by the running of the cars or the locomotives of a railroad company, the presumption of law is that they were negligent, and that presumption remains until the railroad company introduces evidence and shows, or shows by evidence introduced, that it was not negligent.” This charge was not fairly subject to the exception that it “properly led the jury to believe that it was necessary to rebut this presumption by the evidence introduced by the defendant, and that they were not allowed to consider evidence introduced by plaintiff to determine whether this presumption had been overcome.” The words “or shows by evidence introduced,” used by the court, clearly indicated that the evidence introduced by plaintiff should be considered by the jury on the point in question.

Damages—Amount.—In view of the evidence for the plaintiff as to the extent of his injuries and the pain suffered by him in consequence thereof, this court cannot say that the verdict was so excessive as to require a new trial.

Railroads—Injury at Crossing.—The verdict was not without evidence to support it, and the court did not err in refusing to grant a new trial.

(Syllabus by the Court.)

Error from Superior Court, Glynn County; T. A. Parker, Judge.

Action by J. N. Hoodenpyle against the Brunswick & Birmingham Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

W. A. Wimbish, Twitty & Reese, and J. D. Sparks, for plaintiff in error.

F. H. Harris, Ernest Dart, and Courtland Symmes, for defendant in error.

FISH, C. J. Judgment affirmed. All the Justices concur.

LOUISVILLE & N. R. Co. *v.* ARMSTRONG.

(Court of Appeals of Kentucky, Nov. 27, 1907.)

[105 S. W. Rep. 473.]

Railroads—Frightening Animals—Injuries—Estoppel—Plea.—In an action for injuries to plaintiff by his team becoming frightened at the carcass of a horse lying on defendant railroad company's right of way, near a public road crossing, a plea of estoppel alleging that plaintiff, though aware of the presence of the carcass on or near the highway and within the corporate limits of a town, failed for several hours prior to the accident to make it known to the town authorities or request its removal, was demurrable, as the facts did not constitute an estoppel, but were provable to establish assumed risk.

Same—Negligence—Petition.—A petition for injuries to plaintiff by his team becoming frightened at the carcass of a horse lying on defendant railroad company's right of way near a public road crossing in a town was fatally defective, where it failed to allege that defendant knew of the presence of the carcass on defendant's right of way, or that the carcass had remained there an unreasonable length of time, or long enough for defendant to have removed it before plaintiff was injured.

Same—Notice.—Where a petition for injuries to plaintiff by his horses becoming frightened by the carcass of a horse on defendant's right of way near a road crossing alleged that the horse was killed by one of defendant's trains, such allegation was not a sufficient statement that defendant's employees knew that the horse was struck, or that it died from the effects of the collision.

Pleading—Defects—Cure by Answer.—Where a petition for injuries to plaintiff by his horses becoming frightened at the carcass of a horse lying on defendant railroad's right of way was defective for failure to charge that defendant knew of the presence of the carcass, or that it had remained there an unreasonable time, or long enough for defendant to have removed it, such defect was not cured by an answer containing only a traverse and a plea of contributory negligence.

Railroads—Crossing Accident—Proximate Cause.*—Where plaintiff's horses were frightened at the carcass of a horse lying on de-

*For the authorities in this series on the question, what is, and is not, the proximate cause of an injury, see foot-notes appended to *Hayes v. Southern Ry. Co.* (N. Car.), 24 R. R. R. 547, 47 Am. & Eng. R. Cas., N. S., 547; foot-notes appended to *Chicago, etc., R. Co. v. Chestnut Bros.* (Ky.), 24 R. R. R. 108, 47 Am. & Eng. R. Cas., N. S., 108; foot-notes appended to *Thompson v. Cleveland, etc., Ry. Co.* (Ill.), 23 R. R. R. 233, 46 Am. & Eng. R. Cas., N. S., 233; *Stone v. Union Pac. R. Co.* (Utah), 23 R. R. R. 119, 46 Am. & Eng. R. Cas., N. S., 119.

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defendant railroad company's right of way near a road, the killing of the horse by one of defendant's trains was not the proximate cause of plaintiff's injuries resulting from the fright of his team.

Same—Care Required.—Where plaintiff was injured by his horses becoming frightened at the carcass of a horse lying on defendant's right of way near a highway, plaintiff, in order to recover, was required to prove that the carcass was on defendant's right of way in close proximity to the highway, and that defendant knew, or by the use of ordinary care could have known, of its presence within such time as would reasonably have enabled it to have removed the carcass before plaintiff received his injuries.

Same—Notice—Negligence.—Where the fact that a horse had been killed and was lying on defendant railroad company's right of way near a road was not communicated to any employee of the railroad company until less than an hour before plaintiff was injured by his horses becoming frightened at such object, which was removed by defendant's section foreman within two hours thereafter, the removal was made within a reasonable time after notice.

Same.—Where it was not shown that a horse alleged to have been killed by one of defendant's trains was lying wholly on defendant's right of way near a highway, or that its situation was such as to make it apparent to train operatives that it was an obstruction requiring removal because of its proximity to the crossing, or that it was part of the duty of train operatives to inspect dead stock on the right of way and communicate the facts to other agents of the company, the fact that the crews of two or more freight trains and a passenger train passed the carcass during the morning, before its removal and before plaintiff was injured by his horses becoming frightened at the same, was insufficient to charge defendant with notice of its presence.

Same—Contributory Negligence.—Where plaintiff and his companion, though their horses were badly frightened at the carcass of a horse killed by a train and lying on the railroad right of way near the highway, compelled them to pass, and, on returning with a load, or whipped the horses in order to induce them to pass, whereupon they backed the wagon off a fill and caused plaintiff's injuries, plaintiff was negligent as a matter of law, and could not recover.

Negligence—Driver of Vehicle—Imputed Negligence.†—Where plaintiff and his companion were engaged in hauling fodder with a team, and plaintiff was injured while his companion was endeavoring to force the horses past the carcass of a horse on defendant railroad company's right of way near a highway, at which the horses were frightened, the relation of master and servant, or joint undertakers, existed between plaintiff and his companion, so that plaintiff was chargeable with the negligence of the latter.

†For the authorities in this series on the subject of imputed negligence, see foot-notes appended to *Southern Ry. Co. v. King* (Ga.), 24 R. R. R. 785, 47 Am. & Eng. R. Cas., N. S., 785.

Louisville & N. R. Co. v. Armstrong

Appeal from Circuit Court, Boyle County.

"To be officially reported."

Action by S. I. Armstrong against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed for new trial.

Benjamin D. Warfield, Charles R. McDowell, and Chenault Huguely, for appellant.

John C. Voris, Robt. Harding, Jno. W. Rawlings, and Greene & Van Winkle, for appellee.

SETTLE, J. The appellant, Louisville & Nashville Railroad Company, seeks the reversal of a judgment of the Boyle circuit court entered against it upon a verdict awarding appellee, S. I. Armstrong, \$1,000 damages for injuries claimed to have been caused by its alleged negligence in suffering a dead horse to lie and remain upon its right of way near a public road crossing its track at Junction City, at which a pair of horses, driven to a wagon by appellee and John Lewis, became so frightened as to overturn the wagon on an embankment and violently throw the former to the ground, thereby producing the injuries complained of, which are of a serious and probably permanent character. It was alleged in the petition and amended petition that the horse, at whose carcass those driven by appellee and Lewis became frightened, was struck and killed by one of appellant's trains, and thereby thrown "upon said defendant's right of way at and near to and along the edge of said public road, street, and highway, * * * and the defendant negligently and carelessly suffered and permitted said dead horse to be and remain at said point, and the same was calculated to and did alarm and frighten horses being driven and ridden over said roadway by the public," that the dead horse "was a frightful looking object," and did frighten the two horses driven by himself and Lewis causing them to back the wagon off a fill and turn it over, thereby inflicting the injuries complained of, and that the two horses were "gentle and kind horses" at the time of the accident. Appellant filed a demurrer to the petition, which was overruled, and to this ruling it reserved an exception, following which it filed an answer containing three grounds of defense; the first paragraph containing a traverse, the second a plea of contributory negligence, and the third a plea of estoppel based upon the alleged facts that the dead horse was lying upon the public highway and within the limits of Junction City, which is an incorporated town of the sixth class, possessed of such officers as are provided for such towns, and that appellee, though aware of the presence of the dead horse on or near the public highway and within the corporate limits of the town, several hours before the accident resulting in his injuries, failed to make it

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known to the town authorities or request its removal. The lower court sustained a demurrer to the third paragraph of the answer, and the affirmative matter of the first and second paragraphs was denied by reply.

We think the demurrer to the third paragraph of the answer was properly sustained, for what was pleaded therein did not constitute an estoppel, but could have been and was introduced on the trial as evidence conducing to prove appellee's knowledge of the presence of the dead animal at the place of the accident several hours before its occurrence, and that with such knowledge he took the risk of driving by the dead horse, instead of requesting of appellant or the authorities of Junction City its removal. We are further of opinion that the court erred in overruling appellant's demurrer to the petition. The petition does not manifest a cause of action, for it neither alleges that appellant knew of the presence of the dead horse upon its right of way, or that it remained there an unreasonable length of time, or long enough for appellant to have removed it before appellee was injured. It is true it is therein alleged, in substance, that the horse was killed by one of appellant's trains; but, conceding this to be true, it does not necessarily follow that those in charge of the train knew it struck the horse, or that it died from the effects of the collision. The collision doubtless occurred at night, or before daylight in the morning, and it may be that neither the engineer nor fireman saw or realized it, and the fact that the horse was knocked from the track, instead of being run over by the train, would seem to indicate that little, if any, jar to the engine resulted from the collision. As what was left of appellant's answer, after the third paragraph went out on demurrer, contains only a traverse and plea of contributory negligence, it cannot be said to have cured the defects of the petition.

The killing of the horse by one of appellant's trains could not have been the proximate cause of appellee's injuries; but if, after killing the horse, appellant knowingly permitted it to remain upon its right of way for an unreasonable length of time, and it was so near the public road as to frighten the horses of persons driving or riding upon the public road, the dead animal would, in that event, unquestionably become a nuisance; and this would also be true if the horse were to die upon appellant's right of way from natural causes, instead of being killed by the train. "A railroad company is no more privileged than a natural person is to deposit or leave something on or near the public highway which is very unusual, and the obvious tendency of which is to frighten ordinarily gentle horses, especially where it is not necessary for the proper operation of the railroad to do so. For example, a railway company was held liable for personal injuries suffered by one who was thrown from a wagon

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because the horse became frightened at the dead body of a steer negligently removed by railway employees from the railway track, where it was killed, to the side of the high way, where it would not be seen by horses until they had nearly reached it." Thompson on Negligence, vol. 2, § 1916; *L. & N. R. R. Co. v. Wade*, 89 Ky. 255, 12 S. W. 279. It is apparent, therefore, that, in order to recover of appellant for the injuries he sustained, it was incumbent upon appellee to prove that the dead horse in question was upon its right of way in close proximity to the public road, and that it knew, or by the use of ordinary care could have known, of the presence of the animal there within such time as would reasonably have enabled it to remove the carcass before appellee received his injuries, and, moreover, that appellee's injuries did not result from his own failure to use ordinary care. In the case of *Hazelrigg v. Board of Council of the City of Frankfort (Ky.)*, 92 S. W. 584, which was an action to recover for injuries resulting to the occupant of a buggy from an obstruction in the street, it is said: "In order to render the city liable, it must be shown that it, by the exercise of ordinary care, could have known of the existence of the obstruction in the street and removed the danger. We cannot say that it is actionable negligence for the city to fail to discover in three hours an obstruction in one of its streets, caused by a lot of rock screenings being dumped there. There is no evidence that the city knew of the obstruction, and the bare fact that it had been there for three hours is not sufficient to charge it with liability." In the case at bar no witness saw the horse struck by one of appellant's trains; but, judging from the wound upon it, we think it fairly inferable that such was the manner of its death. It is, however, certain from the evidence that his dead body was first discovered early on the morning of November 18, 1906, so his death must have occurred before daylight.

It also appears from the evidence that appellant's servants, intrusted with the work of maintaining the section of its railroad track embracing the place where the dead horse was found, reside a mile and a half east of that point, and that they were at work that day, beginning at an early hour of the morning, east of where they reside. Therefore they were not at or near the place where the horse was found on the morning of that day. The horse was seen by appellee and Lewis at 6:30 or 7 o'clock that morning, as they drove from Junction City out to a farm for a load of fodder belonging to the former. The horses attached to their wagon were then afraid of the dead horse, and were with difficulty driven by it. Although appellee and Lewis, after leaving the place where the dead horse was found, passed near the place of residence of some of the town authorities, they did not mention to them, or any one, that there was a dead

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horse near the crossing, and according to the entire evidence that fact was never communicated to any employee of appellant until 10:30 o'clock on the morning of the day appellee was injured, which was less than an hour prior to the accident; the station agent at Junction City being then informed of it by one McDonald. Upon receiving the information, the station agent immediately notified appellant's section foreman of it, and the latter by 12 o'clock, which was as soon as he could reach the place with his force, removed the dead animal. Appellee was allowed to prove that two or more freight trains and a passenger train passed the dead horse during the morning and before its removal, from which it is argued that the crews of these trains saw, or ought to have seen, the horse, which was a sufficient notice to appellant. We do not accept this view. It does not clearly appear from the evidence that the horse was wholly on appellant's right of way, or that its situation was such as to make it apparent to those in charge of the trains that it was such an obstruction as required removal on account of its proximity to the crossing. It was not made to appear from the evidence that it was the duty of those in charge of passing trains to stop them to inspect such dead stock as might be seen on appellant's right of way, or to communicate to station or other agents of appellant such facts; but it was shown by the evidence that it is the duty of the section foreman, upon being notified of the presence of dead stock on appellant's right of way, to remove it, and this duty with respect to the horse in question was performed by the section foreman within a reasonable time after notice of its presence on the right of way was received from the station agent, who, as before said, communicated it promptly after the fact was made known to him.

With respect to appellee's conduct on the occasion of receiving his injuries, it may be said that the evidence showed him to be guilty of contributory negligence. He had seen the dead horse three or four hours before he was injured. In then approaching it the horses behind which he was riding were frightened and had to be forced to pass it, and when he returned with the load of fodder upon the wagon the dead horse was where it was when he had last seen it, and could be seen by appellee and Lewis several hundred yards before reaching it. In fact both admit that they saw the horse some distance before getting to it, yet under the circumstances they determined to remain upon the wagon and force the horses to pass the frightful object. In the effort to do so the horses became badly frightened and refused to proceed, whereupon Lewis commenced to whip them, which increased their fright and caused them to back the wagon off the fill, overturn it, and cause appellee's injuries. In the language of one of the law books, one cannot "cast himself"

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upon a plainly visible, and to him well known and dangerous, obstruction in or near the highway, though placed or allowed to remain there by the fault of another, and, if injured thereby, be allowed to recover. Such a danger as confronted appellee was not akin to dangerous defects or obstructions in a street or highway, which, though visible at times, are liable to be overlooked or forgotten by the passing pedestrian or traveler; but it was a plainly discernible obstruction, and danger prominently visible, the presence of which, as well as the fact that the horses were afraid of it, was well known to him. In attempting to drive by it in the manner adopted, he and Lewis must be presumed to have understood the risk they ran and the probable consequences. These facts being admitted, the court should have decided as a matter of law that the presence of the dead horse on appellant's right of way was not the proximate cause of appellee's injuries, but that they were caused by his own negligence. Although Lewis was the driver, it is, we think, reasonably plain from the evidence that he either sustained the relation of servant to appellee, or they were joint undertakers, in the enterprise of handling the fodder, and the negligence of either should be imputed to the other.

In our view of the case a peremptory instruction in favor of appellant should have been given, because the petition failed to state a cause of action, the evidence failed to show that appellant knew, or by the use of ordinary care would have known, of the presence of the horse on its right of way in time to have removed it before appellant was injured, and, finally, it was patent from the evidence that appellee's injuries were caused by his own negligence. This conclusion makes it unnecessary for us to consider the instructions given.

For the reasons indicated, the judgment is reversed for a new trial, and for further proceedings consistent with the opinion.

RINEHART v. KANSAS CITY SOUTHERN RY. CO.

(Supreme Court of Missouri, Division No. 1, May 29, 1907.)

[102 S. W. Rep. 958.]

Railroads—Killing Animals on Track—Failure to Fence—Negligence—Question for Jury.—Where, in an action against a railway company for killing a colt entering on its right of way through a defective gate in the right of way fence, the evidence of plaintiff showed that he owned the colt; that it passed through an open gate in the right of way fence onto the railroad track, and was struck by a train and killed; and that the company originally erected a proper fence and gate, but permitted the gate to remain out of repair for the greater portion of a month preceding the killing—a prima facie case for plaintiff was established, notwithstanding substantial contradictory evidence was introduced by the company.

Same—Duty to Fence Track—Statutes.—Rev. St. 1899, § 1105 [Ann. St. 1906, p. 945], requiring every railroad to maintain lawful fences on the sides of the road where the same passes through cultivated fields, etc., sufficient to prevent animals from entering on the railroad, was enacted for the security of live stock, for the benefit of the owners of land through which tracks pass, and for the protection of passengers.

Same—Defective Fence—Killing Animals—Liability.*—A colt left the land of the owner and entered through a defective fence on the land of a third person, and from there passed onto a railway right of way through a defective gate in the railway fence. Held, that the railroad was liable for killing the colt, though it and the third person had agreed that it need not maintain a lawful fence along its road through the third person's land.

Same—Evidence—Burden of Proof.—A railroad company, in an action for killing a colt on its track after it had passed from the owner's land to the land of a third person and from there through a defective fence onto the railroad right of way, must, to escape liability because of an agreement between it and the third person, relieving it from the duty of maintaining a lawful fence along its road through the land of the third person, show that the third person maintained a lawful fence inclosing his premises.

Appeal from Circuit Court, Vernon County; H. C. Timmonds, Judge.

Action by S. J. Rinehart against the Kansas City Southern

*For the authorities in this series on the subject of the liabilities of railroad companies for injuries to stock inflicted by trains as affected by negligence with respect to fencing railroad tracks, see footnotes appended to *Martin v. Chicago, etc., Ry. Co.* (Wyo.), 23 R. R. R. 306, 46 Am. & Eng. R. Cas., N. S., 306.

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Railway Company. There was a judgment of the St. Louis Court of Appeals (80 S. W. 910), affirming a judgment for plaintiff, and the cause was certified to the Supreme Court. Affirmed.

This is an action which was instituted in the circuit court of Vernon county, by the plaintiff against the defendant, seeking to recover double damages, under the provisions of section 1105, Rev. St. 1899 [Ann. St. 1906, p. 945], for the alleged killing of plaintiff's colt by one of defendant's engines and cars, on or about December 25, 1901. Plaintiff introduced evidence, at the trial, tending to prove that he was the owner of the colt at the time it was killed; that it and other horses escaped from his son while being taken to water, in the town of Richards, Mo., on December 25, 1901; that they went about 2½ miles along the public highway and passed through an open gate into a 40-acre field of one Kaufman, and from there through an open gate, at a farm crossing, onto defendant's right of way, and was there struck and killed by one of defendant's engines and train of cars; that said gate had been out of repair and open from 1 to 12 months prior to the killing; that the gate through which the colt passed into the field of Kaufman was open on the day of the injury, and had been several days and weeks prior thereto; that the Kaufman gate was not a lawful gate; and that the colt was worth \$40. Defendant's evidence tended to prove that there were several intervening tracts of land lying between plaintiff's home and the point on defendant's right of way where the colt was killed, which belonged to different owners, and in order to reach that point it would be necessary for the colt to trespass upon and pass over all of said lands; that the defendant and Kaufman had an arrangement or agreement by which the gate in the right of way fence, at the farm crossing, and its condition, was satisfactory to said Kaufman; that the gate was closed and securely fastened four or five days prior to the date on which the colt was killed; and that at 4 o'clock p. m., December 24th, the day before the accident, Kaufman closed and securely fastened the gate leading from the public highway into his field. Defendant demurred at the close of plaintiff's case in chief, and again at the close of all of the evidence in the cause, each of which was by the court overruled, and defendant duly excepted.

The court then, over defendant's objections, instructed the jury for plaintiff as follows: "(1) The court instructs the jury that if they find from the evidence that plaintiff's colt went upon defendant's track, and was struck and killed by defendant's train, by reason of the failure of defendant to construct and maintain a lawful fence at a point on its railroad where by law it was required to fence, and that said colt did not pass over a lawful fence in getting to the railroad, then and in that case

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the verdict should be for the plaintiff in such sum as you may believe from the evidence to have been the market value of the colt at the time it was killed, not to exceed \$40. (2) The court instructs the jury that any understanding or agreement defendant may have had with Kaufman, to the effect that defendant need not maintain a lawful fence along their road through his land, is no defense to this case, unless said Kaufman's field was inclosed with a lawful fence." To the action of the court in giving said instructions, defendant duly excepted.

The defendant asked the court to give instructions numbered from 1 to 7, inclusive, and the court gave the first four, but refused to give 5, 6, and 7, as asked, to which action of the court the defendant duly excepted. The court modified instructions 5 and 6, and gave them as modified, to which action of the court defendant duly excepted. Said instructions 5, 6, and 7, as asked, are as follows: "(5) The court declares the law to be in this case that the duty to fence its road by a railroad company is for the benefit of the adjoining landowner, and that an adjoining landowner through and along whose land a railroad passes may waive the right to have such fences and gates as are prescribed by the statutes, or agree between themselves to dispense with same; and if you believe from the evidence that the adjoining landowner, Arthur Kaufman, did so waive his right in this instance, and that the plaintiff's colt was trespassing in said Kaufman's field, and was in such field without any consent from said Kaufman, then your verdict will be for the defendant. (6) If the jury believe from the evidence that the defendant's foreman closed the gate on its right of way from two to five days before the 25th day of December, 1901, and that he closed said gate whenever found open by him, then your verdict will be for the defendant. (7) The court instructs the jury that if they believe from the evidence that the plaintiff was not an adjoining landowner nor a next adjoining landowner to the defendant's railroad, and that plaintiff's colt strayed from his place or field some 2½ or 3 miles from the railroad, and point at which it was killed, if it was so killed, and that in reaching said point on said railroad said colt passed over and along the lands of several intervening proprietors before reaching same, then plaintiff cannot recover against the defendant on the ground of its failure, if there was such a failure, to maintain a sufficient and legal gate at and along Kaufman's field, and your verdict will be for the defendant."

And instructions numbered 5 and 6, as modified and given by the court, are as follows: "(5) The court declares it to be the law in this case that the duty to fence its railroad by a railroad company is for the benefit of the adjoining landowner, and that an adjoining landowner through or along whose land a rail-

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road passes may waive the right to have such fences and gates as are prescribed by the statute, or agree between themselves to dispense with same; and if you believe from the evidence that the adjoining landowner, Arthur Kaufman, did so waive his right in this instance, and that plaintiff's colt was trespassing in said Kaufman's field, by going over or through a legal fence, and was in such field without any consent from said Kaufman, then your verdict will be for the defendant. (6) If the jury believe from the evidence that defendant's foreman closed the gate on its right of way from two to five days before the 25th day of December, 1901, and that he closed said gate whenever found open by him, and that he used due care and diligence in looking after said gate to discover when it was open, then your verdict will be for the defendant."

The cause was submitted to the jury under the evidence and instructions, and they found for plaintiff, and found his damage at the sum of \$40. In due time defendant filed its motions for a new trial and in arrest of judgment, which were, by the court, overruled, and in due time defendant appealed to the Kansas City Court of Appeals. There the judgment of the circuit court was affirmed, but the cause was certified to this court under the Constitution, because the opinion is in conflict with the opinion of the St. Louis Court of Appeals in the case of *Ferris v. St. Louis & Han. Ry. Co.*, reported in 30 Mo. App. 122.

Lathrop, Morrow, Fox & Moore, Cyrus Crane, and J. P. Gilmore, for appellant.

W. H. Hallett, for respondent.

WOODSON J. (after stating the facts). The first point presented by defendant for our consideration is the ruling of the trial court upon the demurrers offered at the close of plaintiff's evidence in chief, and at the conclusion of all the evidence in the case. This question is so closely connected with the ruling of the trial court in giving instruction No. 2 for plaintiff, and in modifying and giving instruction No. 5 for defendant, we feel justified in considering the two questions together. This suit grew out of the defendant's alleged violation of the provisions of section 1105 of the Revised Statutes of 1899 [Ann. St. 1906, p. 945], requiring railroads to fence and otherwise inclose their tracks and right of ways. That section, in so far as applicable to the questions involved in this appeal, is as follows: "Every railroad corporation formed in this state, * * * shall erect and maintain lawful fences on the sides of the road where the same pass through, along or adjoining inclosed or cultivated fields or uninclosed lands, with openings and gates therein, to be hung and have latches or hooks, so that they may be easily opened and shut at all necessary farm crossings of the road for the use

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of the proprietors or owners of the land adjoining such railroad and also to construct and maintain cattle guards where fences are required, sufficient to prevent horses, cattle, mules and all other animals from getting on the railroad." This section requires the railroad to erect and maintain substantial fences along the sides of its road as it passes through the character of premises therein described, and to erect and maintain gates at farm crossings, all to be at least five feet in height and sufficient in character to turn horses, cattle, mules and other animals. The undisputed evidence shows the fences and gates were properly erected in the first instance by the railroad company; but the evidence for plaintiff tended to show that they were not maintained, at the place of accident, up to the standard prescribed by the statute, and, because of the leaning condition of one of the gate posts at the farm crossing, it was difficult to fasten and keep the gate closed, and as a result the gate was opened upon the occasion mentioned, and had been for the greater portion of the time during the month just preceding the killing, if not longer. Plaintiff's evidence also tended to show he was the owner of the colt, and that it passed through the open gate onto the railroad tracks, and was struck by one of its engines, and was killed. This evidence showed a violation of the statute, and a consequent damage to plaintiff.

The demurrers admit the truthfulness of that evidence, with all the reasonable inferences that may be legitimately drawn from it. This made out a *prima facie* case for plaintiff, and entitled him to go to the jury. The fact the defendant introduced substantial evidence tending to show a converse state of facts from that contended for by plaintiff did not destroy or militate against plaintiff's right to have a jury pass upon the case. *Gibson v. Zimmerman*, 27 Mo. App. 90; *Boone v. Railway*, 20 Mo. App. 235; *Gregory v. Chambers*, 78 Mo. 298; *Kenney v. Railroad Co.*, 80 Mo. 573; *Milliken v. Thyson Com. Co.* (Mo. Sup.) 100 S. W. 604, 608. There was, therefore, no error in the refusal of the court to give the demurrers to the evidence, provided there was no error in the action of the court in giving instruction No. 2, for plaintiff, and its refusal to give defendant's instruction No. 5, as asked.

Plaintiff's second instruction, in substance, told the jury that the agreement between Kaufman and defendant to dispense with the fence and gate along the side of the right of way of the railroad, as located in his field, was no defense to his right of recovery in this case, provided said field was not inclosed with a lawful fence. Defendant's fifth refused instruction declares a contrary declaration of the law from that announced by plaintiff's second, and told the jury that said agreement was a bar, provided the colt was trespassing upon Kaufman's land, and

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passed from there onto the railroad. If plaintiff's instruction is a correct statement of the law, then the court properly refused defendant's, and the judgment should be affirmed; but if, upon the other hand, the law is as announced in defendant's refused instruction, then the court erred in refusing it, and in giving plaintiff's. So the question here presented is: Which of the two instructions correctly states the law of the case? The statute requiring railroads to be fenced had a threefold purpose, namely, for the security of live stock, for the benefit and protection of the owners of inclosures through which the road passes, and chiefly the preservation of the persons and lives of passengers which would be greatly endangered if cattle and other live stock were not restrained from going upon the tracks. *Stanley v. Railway Co.*, 84 Mo. 630; *Berry v. Railroad Co.*, 65 Mo. 175. In the discussion of a similar case to this, this court said: "In a county where the stock law is in force, a railroad company is relieved from the duty of fencing against swine merely to prevent their getting upon its tracks, as where the road passes through uninclosed lands; but the legal obligation to erect and maintain lawful fences on the sides of the road, where the same passes through, along, or adjoining inclosed or cultivated fields, remains the same everywhere in the state. The general statute, too, requires these lawful fences to be built and maintained for a double purpose, as we have seen; it devotes them to the purpose of inclosing the fields, as well as the railroad strip. They are required, among other things, to prevent damages resulting by reason of any horses, cattle, mules, or other animals escaping from or coming upon such lands, fields, or inclosures." *Stanley v. Railway Co.*, 84 Mo. 631. The same is true of this case.

The company was required by the statute to erect and maintain a lawful fence on the sides of its road as it passed through Kaufman's field, but the evidence for plaintiff tended to show the gate and fence were out of repair and in a neglected and dilapidated condition; that the gate post was out of plumb, which rendered it difficult to fasten and keep closed; and that on that account it was open at the time the colt was killed, and had been during most of the month of December, and on account of the gate being open the colt wandered upon the track, and was struck and killed by one of defendant's engines. A lawful gate, with proper fastenings, and kept closed, would have prevented the injury, and the failure to maintain such a gate was the direct cause of the injury, and plaintiff was thereby damaged to the extent of the value of the colt, which the evidence showed was worth \$40, the amount of the verdict returned by the jury. According to the rule announced in the *Stanley Case*, *supra*, which has been expressly approved by this court in the following cases, there can be no doubt as to the defendant's liability

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for the damages in this case. *Kingsbury v. Railway*, 156 Mo. 388, 57 S. W. 547; *Darby v. Railway*, 156 Mo. 391, 57 S. W. 550. To the same effect are the following cases: *Morrow v. Railway*, 17 Mo. App. 103; *Doyle v. Railroad*, 21 Mo. App. 416; *Cole v. Railroad*, 47 Mo. App. 624.

Defendant does not seriously controvert the conclusion above reached, but tries to escape the conclusion by saying that the plaintiff was not an adjoining landowner or proprietor, nor a next adjoining owner or proprietor to the railroad where the colt strayed upon the roadway, but resided some two or three miles away from the point of injury, with several intervening owners or proprietors, and that the colt had to necessarily pass over one or more of said inclosures in order to reach the place where the accident occurred, and that, in fact, did pass over the inclosed farm lands of one Kaufman, and from there onto the railroad tracks, to the place where the injury occurred. Under these facts, defendant contends it is not liable to plaintiff for the damages sustained by him, on account of the injury to the colt, and assigns as a reason for that contention that section 1105 is intended for the protection of the adjoining property owner only, and not for trespassers or the owners of animals which are unlawfully upon the adjoining inclosures. In support of this doctrine, defendant cites the following cases: *Ferris v. St. L. & Han. Ry. Co.*, 30 Mo. App. 124; *Houston, etc., Ry. Co. v. Hollingsworth* (Tex. Civ. App.), 68 S. W. 724; *Texas, etc., Ry. Co. v. Huffman* (Tex. Civ. App.), 71 S. W. 779. These cases support the rule contended for by the defendant, but they are not in harmony with the current adjudications of this state. Our attention has not been called to but one case in this state which upholds that doctrine, and that is the case of *Ferris v. Railway*, supra. The law of this state, as enunciated in the cases before cited, and those referred to by the Kansas City Court of Appeals in this case, is in direct conflict with the rule laid down in the *Ferris* Case, and for that reason it is hereby overruled.

There is another complete answer to defendant's contention; and that is this: The evidence tended to show and the jury found that Kaufman's field was not inclosed by a lawful fence. That being true, the colt, under the facts of this case, was not a trespasser while upon his land, and before defendant could successfully interpose the contract of waiver between it and Kaufman, regarding the railroad fence and gate, the burden rested upon it to show Kaufman's fence was a lawful fence, which it attempted to do, but failed, as shown by the instructions of the court and the verdict of the jury.

For the reasons herein stated, the judgment of the Kansas City Court of Appeals, affirming the judgment of the circuit court, is hereby affirmed. All concur; GRAVES, J., in result.

GALVESTON, HARRISBURG & SAN ANTONIO RAILWAY COMPANY
et al., Plffs. in Err., *v.* STATE OF TEXAS. .

(Argued April 21, 22, 1908. Decided May 18, 1908.)

[28 Sup. Ct. Rep. 638.]

Commerce—State Taxation of Railway Gross Receipts.*—The state cannot impose the tax levied by Texas act of April 17, 1905, upon railway companies whose lines lie wholly within the state, "equal to 1 per centum of their gross receipts," where a part, and, in some cases, much the larger part, of these gross receipts, is derived from the carriage of passengers and freight coming from, or destined to, points without the state.

In Error to the Supreme Court of the State of Texas to review a judgment which reversed a judgment of the Court of Civil Appeals of that state, reversing a judgment of the District Court of Travis County, in favor of the state, in an action to recover a tax on the gross receipts of railway companies. Reversed.

See same case below (Tex.) 97 S. W. 71.

The facts are stated in the opinion.

Messrs. Hiram M. Garwood, Maxwell Evarts, Robert S. Lovett, and Messrs. Baker, Botts, Parker & Garwood for plaintiffs in error.

Messrs. William Edward Hawkins and Robert Vance Davidson for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court:

This is an action against certain railroads to recover taxes and penalties. The supreme court of the state held the penalties to be void under the state Constitution, but upheld the tax. 97 S. W. 71. The railroads bring the case here mainly on the ground that the law upon which the action is based is an attempt to regulate commerce among the states.

The act in question is entitled, "An Act Imposing a Tax upon Railroad Corporations * * * and Other Persons * * * Owning * * * or Controlling Any Line of Railroad in This State * * * Equal to 1 Per Cent. of Their Gross Receipts, * * * and Repealing the Existing Tax on the Gross Passenger Earnings

*For the authorities in this series on the subject of state regulation or interference with interstate commerce, see foot-notes appended to *Venning v. Atlantic Coast Line R. Co.* (S. Car.), 26 R. R. R. 666, 49 Am. & Eng. R. Cas., N. S., 666; foot-notes appended to *Cincinnati, etc., R. Co. v. Commonwealth* (Ky.), 26 R. R. R. 632, 49 Am. & Eng. R. Cas., N. S., 632; *State v. Cumberland & P. R. Co.* (Md.), 25 R. R. R. 122, 48 Am. & Eng. R. Cas., N. S., 122

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of Railroads." It proceeds in § 1 to impose upon such railroads "an annual tax for the year 1905, and for each calendar year thereafter, equal to 1 per centum of its gross receipts, if such line of railroad lies wholly within the state." In § 2 a report, under oath, of "the gross receipts of such line of railroad, from every source whatever, for the year ending on the 30th day of June last preceding," and immediate payment of the tax, "calculated on the gross receipts so reported," are required. The comptroller is given power to call for other reports, and is to "estimate such tax on the true gross receipts thereby disclosed," etc. The lines of the railroads concerned are wholly within the state, but they connect with other lines, and a part, in some instances much the larger part, of their gross receipts is derived from the carriage of passengers and freight coming from, or destined to, points without the state. In view of this portion of their business, the railroads contend that the case is governed by *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. Ed. 1200, 1 Inters. Com. Rep. 308, 7 Sup. Ct. Rep. 1118. The counsel for the state rely upon *Maine v. Grand Trunk R. Co.*, 142 U. S. 217, 35 L. Ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163, and maintain, if necessary, that the later overrules the earlier case.

In *Philadelphia & S. Mail S. S. Co. v. Pennsylvania*, *supra*, it was decided that a tax upon the gross receipts of a steamship corporation of the state, when such receipts were derived from commerce between the states and with foreign countries, was unconstitutional. We regard this decision as unshaken and as stating established law. It cites the earlier cases to the same effect. Later ones are *Ratterman v. Western U. Teleg. Co.*, 127 U. S. 411, 32 L. Ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; *Western U. Teleg. Co. v. Pennsylvania*, 128 U. S. 39, 32 L. Ed. 345, 2 Inters. Com. Rep. 241, 9 Sup. Ct. Rep. 6; *Western U. Teleg. Co. v. Alabama Bd. of Assessment (Western U. Teleg. Co. v. Seay)*, 132 U. S. 472, 33 L. Ed. 409, 2 Inters. Com. Rep. 726, 10 Sup. Ct. Rep. 161. See also *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 25, 33 L. Ed. 613, 617, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Ficklen v. Taxing District*, 145 U. S. 1, 22, 36 L. Ed. 601, 606, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810; *New York, L. E. & W. R. Co. v. Pennsylvania*, 158 U. S. 431, 438, 39 L. Ed. 1043, 1045, 15 Sup. Ct. Rep. 896; *McHenry v. Alford*, 168 U. S. 651, 670, 671, 42 L. Ed. 614, 621, 18 Sup. Ct. Rep. 242; *Atlantic & P. Teleg. Co. v. Philadelphia*, 190 U. S. 160, 162, 47 L. Ed. 995, 999, 23 Sup. Ct. Rep. 817. In *Maine v. Grand Trunk R. Co.* *supra*, the authority of the *Philadelphia Steamship Company Case* was accepted without question, and the decision was justified by the majority as not in any way qualifying or impair-

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ing it. The validity of the distinction was what divided the court.

It being once admitted, as of course it must be, that not every law that affects commerce among the states is a regulation of it in a constitutional sense, nice distinctions are to be expected. Regulation and commerce among the states both are practical rather than technical conceptions, and, naturally, their limits must be fixed by practical lines. As the property of companies engaged in such commerce may be taxed (Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 35 L. Ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876), and may be taxed at its value as it is, in its organic relations, and not merely as a congeries of unrelated items, taxes on such property have been sustained that took account of the augmentation of value from the commerce in which it was engaged. Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. Ed. 683, 17 Sup. Ct. Rep. 305; Adams Exp. Co. v. Kentucky, 166 U. S. 171, 41 L. Ed. 960, 17 Sup. Ct. Rep. 527; Fargo v. Hart, 193 U. S. 490, 499, 48 L. Ed. 761, 765, 24 Sup. Ct. Rep. 498. So it has been held that a tax on the property and business of a railroad operated within the state might be estimated *prima facie* by gross income, computed by adding to the income derived from business within the state the proportion of interstate business equal to the proportion between the road over which the business was carried within the state to the total length of the road over which it was carried. Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 48 L. Ed. 229, 24 Sup. Ct. Rep. 107.

Since the commercial value of property consists in the expectation of income from it, and since taxes ultimately, at least, in the long run, come out of income, obviously taxes called taxes on property, and those called taxes on income or receipts, tend to run into each other somewhat as fair value and anticipated profits run into each other in the law of damages. The difficulty of distinguishing them became greater when it was decided, not without much debate and difference of opinion, that interstate carriers' property might be taxed as a going concern. In Wisconsin & M. R. Co. v. Powers, *supra*, the measure of property by income purported only to be *prima facie* valid. But the extreme case came earlier. In Maine v. Grand Trunk R. Co., *supra*, "an annual excise tax for the privilege of exercising its franchise" was levied upon everyone operating a railroad in the state, fixed by percentages, varying up to a certain limit, upon the average gross receipts per mile multiplied by the number of miles within the state, when the road extended outside. This seems at first sight like a reaction from the Philadelphia & Southern Mail Steamship Company Case. But it may not have been. The estimated gross receipts per mile may be said to have

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been made a measure of the value of the property per mile. That the effort of the state was to reach that value, and not to fasten on the receipts from transportation as such, was shown by the fact that the scheme of the statute was to establish a system. The buildings of the railroad and its lands and fixtures outside of its right of way were to be taxed locally, as other property was taxed, and this excise with the local tax were to be in lieu of all taxes. The language shows that the local tax was not expected to include the additional value gained by the property being part of a going concern. That idea came in later. The excise was an attempt to reach that additional value. The two taxes together fairly may be called a commutation tax. See *Ficklen v. Taxing District*, 145 U. S. 1, 23, 36 L. Ed. 601, 607, 4 Inters. Com. Rep. 79, 12 Sup. Ct. Rep. 810; *Postal Teleg. Cable Co. v. Adams*, 155 U. S. 688, 697, 39 L. Ed. 311, 316, 5 Inters. Com. Rep. 1, 15 Sup. Ct. Rep. 268, 360; *McHenry v. Alford*, 168 U. S. 651, 670, 671, 42 L. Ed. 614, 621, 18 Sup. Ct. Rep. 242.

"By whatever name the exaction may be called, if it amounts to no more than the ordinary tax upon property or a just equivalent therefor, ascertained by reference thereto, it is not open to attack as inconsistent with the Constitution." *Postal Teleg. Cable Co. v. Adams*, *supra*. See *New York, L. E. & W. R. Co. v. Pennsylvania*, 158 U. S. 431, 438, 439, 39 L. Ed. 1043, 1045, 1046, 15 Sup. Ct. Rep. 896. The question is whether this is such a tax. It appears sufficiently, perhaps from what has been said, that we are to look for a practical rather than a logical or philosophical distinction. The state must be allowed to tax the property, and to tax it at its actual value as a going concern. On the other hand, the state cannot tax the interstate business. The two necessities hardly admit of an absolute logical reconciliation. Yet the distinction is not without sense. When a legislature is trying simply to value property, it is less likely to attempt or to effect injurious regulation than when it is aiming directly at the receipts from interstate commerce. A practical line can be drawn by taking the whole scheme of taxation into account. That must be done by this court as best it can. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name of form. *Stockard v. Morgan*, 185 U. S. 27, 37, 46 L. Ed. 785, 794, 22 Sup. Ct. Rep. 576; *Asbeil v. Kansas*, 209 U. S. 251, 254, 256, ante, 485, 28 Sup. Ct. Rep. 485.

We are of opinion that the statute levying this tax does amount to an attempt to regulate commerce among the states. The dis-

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inction between a tax "equal to" 1 per cent. of gross receipts, and a tax of 1 per cent. of the same, seems to us nothing, except where the former phrase is the index of an actual attempt to reach the property and to let the interstate traffic and the receipts from it alone. We find no such attempt or anything to qualify the plain inference from the statute, taken by itself. On the contrary, we rather infer from the judgment of the state court and from the argument on behalf of the state than another tax on the property of the railroad is upon a valuation of that property, taken as a going concern. This is merely an effort to reach the gross receipts, not even disguised by the name of an occupation tax, and in no way helped by the words "equal to."

Of course, it does not matter that the plaintiffs in error are domestic corporations, or that the tax embraces indiscriminately gross receipts from commerce within as well as outside of the state. We are of opinion that the judgments should be reversed. Judgment reversed.

PEOPLE *ex rel.* LEE, Tax Collector, *v.* ILLINOIS CENT R. CO.

(Supreme Court of Illinois, Dec. 17, 1907.)

[83 N. E. Rep. 132.]

Taxation—Railroads—Exempt Property.*—A railroad owned a stone quarry about 300 feet from its right of way, connected therewith by a switch track. For some time it quarried stone for its sole use. Subsequently it authorized one to locate a crushing plant thereon. The latter had the right to sell crushed stone, provided the chief engineer of the railroad consented thereto. After the removal of the crusher, the quarry was not used, and the railroad sold the privilege of taking ice therefrom. All material from the quarry had

*For the authorities in this series on the question whether or not property is "railroad property," so as to be exempt from taxation under certain statutory provisions, see extensive note, 23 Am. & Eng. R. Cas., N. S., 282, foot-note appended to *New Jersey, etc., R. Co. v. Mayor (N. J.)*, 14 Am. & Eng. R. Cas., N. S., 192 (railroad lands); *In re Erie R. Co. (N. J.)*, 21 Am. & Eng. R. Cas., N. S., 695 (property not used for railroad purposes); *Ford v. Delta & Pine Land Co. (U. S.)*, 6 Am. & Eng. R. Cas., N. S., 395 (property not necessary for railroad's business); *Grand Rapids & I. Ry. Co. v. Grand Rapids (Mich.)*, 14 R. R. R. 704, 37 Am. & Eng. R. Cas., N. S., 704 (use for railroad purposes, what was, and was not).

For the authorities in this series on the subject of what, is, and is not, taxable as part of railroad company's right of way, roadbed, or tracks, see foot-notes appended to *People v. Illinois Cent. R. Co. (Ill.)*, 15 R. R. R. 825, 38 Am. & Eng. R. Cas., N. S., 825, where all the preceding ones are collected; *Chicago, etc., R. Co. v. People (Ill.)*, 18 R. R. R. 826, 41 Am. & Eng. R. Cas., N. S., 826.

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been billed to the railroad, and no freight had been charged therefor. Held, that the quarry was used in connection with the railroad for railroad purposes, and was exempt from taxation under its charter. Priv. Laws 1851, p. 72, § 22.

Appeal from Kankakee County Court; A. W. Deselm, Judge.

Action by the people, on the relation of Dan Lee, collector of taxes, against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

W. R. Hunter (John B. Drennan, of counsel), for appellant.
J. Bert Miller, State's Atty., for appellee.

DUNN, J. This appeal is from the judgment of the county court of Kankakee county against two blocks of ground in the city of Kankakee belonging to the Illinois Central Railroad Company for delinquent taxes. The question is whether the property is exempt from taxation under section 22 of the company's charter. Priv. Laws 1851, p. 72.

The evidence shows that the property assessed is a stone quarry about 300 feet from the right of way of the railroad, and connected therewith by a switch track. Between the right of way and this property are houses, lots, and a street. Prior to 1897 the company kept a gang of men there, who quarried gravel and stone for the use of the company only. On February 15, 1897, the company made a contract with the Sinclair Construction Company for one year, by the terms of which the construction company located a crushing plant on the quarry and agreed to crush at least 30,000 cubic yards of stone for the railroad company. The construction company had the right to sell crushed stone and screenings to any third party, provided the chief engineer of the railroad company should first, in its interest and at his option, give his written consent. In case the construction company did sell to third parties, the railroad company was to receive five cents for each cubic yard of crushed stone or screenings thus furnished from this quarry. In 1897 the construction company set up a crusher, as provided in the contract, and crushed stone for the company to ballast track. Sinclair died in 1903. The crusher was removed, and the quarry has not been used since he died. In 1906 the railroad sold or leased the privilege of taking ice therefrom. All material from the quarry was billed to the railroad company, and no freight was charged therefor. There were several tracks in the quarry, which were moved from time to time.

It is manifest that this quarry, whether "railroad track," as that term is used in revenue act, or not, was used in connection with the railroad for railroad purposes. Gravel and bal-

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last are indispensable to the maintenance of the roadbed and the safe operation of the road. Whatever was necessary for the construction and operation of the railroad was exempt from taxation. In the Matter of Swigert, 119 Ill. 83, 6 N. E. 469. Though for the present it is not worked, the evidence does not show that the quarry has been permanently abandoned as a source from which to take ballast. So far as appears the tracks are still there, and it may be used again at any time. It is not used for any other purpose. The sale of the privilege of cutting ice is a mere incident, which does not deprive the quarry of its character of railroad property. *People v. Atchison, Topeka & Santa Fe Railway Co.*, 225 Ill. 593, 80 N. E. 272.

The judgment is reversed, and the cause remanded, with directions to sustain the objections.

Reversed and remanded, with directions.

S. B. LUTTRELL & Co. v. KNOXVILLE, L. & J. R. Co. et al.

(Supreme Court of Tennessee, Nov. 30, 1907.)

[105 S. W. Rep. 565.]

Railroads—Liens—Proceedings to Enforce—Parties.—In a suit to enforce a lien on property of a railroad company founded on an unadjudicated claim for materials furnished to a subcontractor, to whom the principal contractor employed by the railroad company let part of the work for the construction of a tunnel, the subcontractor is a necessary party.

Equity—Parties—Waiver of Defects—Failure to Object.—In a suit against a railway company to enforce a lien founded on an unadjudicated claim for materials furnished to a subcontractor, failure to make the subcontractor a party is waived by defendant by answering to the merits, without making the objection in the trial court by demurrer or otherwise.

Railroads—Liens—Enforcement—Waiver of Defects—Amendment of Answer.—Where, in a suit against a railway company to enforce a lien founded on an unadjudicated claim for materials furnished a subcontractor in the construction of a tunnel for defendant, evidence showing that the materials were furnished the subcontractor and by him used in the construction of the tunnel is admitted without objection by defendant, an amended answer, denying that complainants have taken the necessary steps to fix a lien in their favor upon respondent's property and that complainants have acquired or are entitled to any lien on such property, does not raise the objection of failure of complainants to first establish their claim against the subcontractor, or to make him a defendant in the action against the rail-

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road, so as to avoid a waiver of the objection of want of necessary parties.

Same—Notice of Lien—Defects—Waiver.—In a suit to enforce a lien for materials furnished a subcontractor in the construction of a railroad tunnel, defects in complainants' notice to the railroad company may be waived by it, and the same is waived where no objection is made thereto in the trial court.

Same—Jurisdiction of Equity—Attachment of Property.—Where a verified bill to enforce a lien for materials furnished a railroad subcontractor is framed in strict conformity with the statute creating the lien, in which statute there is no provision requiring attachment of the property sought to be subjected, a decree in chancery allowing such lien upon the property, by substantially the same description as that given in the bill, is not erroneous as having been rendered without jurisdiction, because of complainants' failure to bring the property into the custody of the court by attachment or other process, where no question is made in the answer with regard to the description of the property as given in the bill.

Mechanics' Liens—Statutory Provisions—Construction.—A mechanic's lien law will be construed liberally, to carry out its purpose, and to secure and protect those entitled to the lien, and thereby to promote and encourage improvements.

Railroads—Liens—Lienable Materials.*—Explosives used in grading a tunnel for a railroad are materials for which the furnisher is entitled to a lien, under the act conferring a lien for work and materials furnished in the construction and repair of railroads (Acts 1883, p. 297, c. 220, § 3, as amended by Acts 1891, p. 215, c. 98, § 1), giving such lien to materialmen "for the delivery of material" to a subcontractor "who performs any part of the work in grading any railroad company's roadway, or who constructs or aids in the construction or repairs of its culverts or bridges, * * * or who aids in the laying of its track."

Same.*—A materialman has a lien for materials furnished in good faith to a subcontractor to be used in the construction of railroad culverts, bridges, and other improvements, though such materials are not actually used in the improvements.

Same.*—Materials furnished to a railroad subcontractor for the erection of shanties on lots adjacent to the railroad right of way for the shelter of his workmen are not lienable material, under Acts 1883, p. 297, c. 220, § 3, as amended by Acts 1891, p. 215, c. 98, § 1.

*For the authorities in this series on the subject of liens against, or in favor of, railroads, see foot-notes appended to *Ozark & C. Cent. R. Co. v. Moran B. & N. Mfg. Co. (Ark.)*, 15 R. R. R. 784, 38 Am. & Eng. R. Cas., N. S., 784, where all the preceding ones are collected; *Savannah, etc., Ry. Co. v. Tolbert (Ga.)*, 18 R. R. R. 288, 41 Am. & Eng. R. Cas., N. S., 288 (carrier's lien on freight); *Kentucky, etc., R. Co. v. Clemmons (Ky.)*, 17 R. R. R. 155, 40 Am. & Eng. R. Cas., N. S., 155.

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Same.*—Gasoline, gasoline torches, and coal oil used for lighting a railroad tunnel while in process of construction, packing, mattocks, cotton waste, electric light supplies, carts, tools, shovels, spades, blacksmith tools, wagons, scrapers, plows, machines, machinery, derricks, derrick crabs, cables, and repairs for all these, are not lienable, within Acts 1883, p. 297, c. 220, § 3, as amended by Acts 1891, p. 215, c. 98, § 1.

Same.*—Under such statutes tableware and commissary supplies furnished to a subcontractor and materials furnished to the workmen in part payment for their labor are not lienable, as the sense in which they enter into the construction of the road is too remote.

Appeal from Chancery Court, Anderson County; Hugh G. Kyle, Chancellor.

Suit by S. V. Luttrell & Co. against the Knoxville La Follette & Jellico Railroad Company and others to enforce a mechanic's lien. From a judgment for plaintiffs both plaintiffs and certain defendants appeal. Reversed and remanded.

Templeton & Templeton, for plaintiffs.

Cornick, Wright & Frantz and *X. Z. Hicks*, for defendant railroad companies.

Shields, Cates & Mountcastle, for defendant Mason & Hoge Co.

HENDERSON, J. The original bill was filed in the chancery court of Anderson county February 3, 1905, by complainants, a copartnership engaged in the hardware business at Knoxville, against the Knoxville, La Follette & Jellico Railroad Company, a Tennessee corporation, the Louisville & Nashville Railroad Company, a Kentucky corporation, and Mason & Hoge Company, a corporation or copartnership, defendants.

Complainants furnished materials and supplies, etc., to G. H. Cole & Co. to the amount of \$10,506.45, which were used in the building and construction of Dossett's tunnel on the defendant's railroad, said G. H. Cole & Co. being subcontractors under Mason & Hoge Company; and the prayer of the bill is to have their account declared a lien on the property of the railroads, under chapter 98, p. 215, of the Acts of 1891.

After certain interlocutory orders and report of special master, the chancellor declared a lien for a portion of the account, and refused to do so for the balance, dismissing the bill as to Mason & Hoge Company. Complainants have appealed from the portion of the decree that disallows the lien; and the two railroad companies appeal from the portion of the decree adverse to them. Both sides have assigned errors.

We first consider the first assignment of error by the railroad

*See foot-note, preceding page.

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companies, as that presents a preliminary question. This assignment is as follows:

"The chancellor erred in holding and decreeing that the complainants have acquired a lien on the property of the appellant railroad companies, under this proceeding, for any part of their alleged account against G. H. Cole & Co. There is no privity of contract between the complainants and either of the defendants, and as G. H. Cole & Co. are not sued, and the property of the defendants is not brought into the custody of the court by attachment, the chancery court did not acquire jurisdiction either of the person against whom complainants would be entitled to a judgment or of the property which they seek to have subjected to the payment of their alleged claim against G. H. Cole & Co., and the decree of the chancery court in this cause is absolutely void."

This is a suit upon an open, unliquidated account for materials, etc., furnished G. H. Cole & Co., the subcontractors, and which were used in the construction of the railroad. It is argued that it is necessarily a proceeding to recover judgment in personam against the subcontractors, and a proceeding in rem against the property in which the subcontractor has no interest, and that, to enable the court to pronounce judgment in rem, complainants must first obtain a personal judgment against the subcontractor and bring the property of the railroad into the custody of the court by attachment, or, at least, that the subcontractor is a necessary party to the proceeding to enforce the lien under chapter 98, p. 215, of the Acts of 1891.

The act of 1891 amends chapter 220, p. 296, of the Acts of 1883, and the lien is given by section 1, p. 215, of the Acts of 1891, to the materialman and others on the property of the railroad "in as full and ample a manner as is now provided by law for persons contracting directly with such railroad company for any such work and labor done or for materials furnished, provided that within ninety days after * * * such materials are furnished * * * such materialman * * * shall notify in writing any such railroad company, or the owner of such railroad, should it or they reside in the state, or its or their agents or attorneys, should it or they be beyond the limits of the state, that said lien is claimed, specifying in the face of said notice the character of the * * * materials furnished, and the value thereof; and said lien shall continue for the space of one year from the service of said notice, and continue until the termination of any suit commenced for the enforcement of said liens, brought within said one year; and said liens shall have priority over all other liens on such railroad, its property and franchises."

Section 2 provides "that the liens provided for in this act

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may be enforced by suits brought against such railroad company in the circuit or chancery court of the county or district where the work or material, or any part thereof, was done or furnished, or any part of said services was rendered."

Section 3 provides "that the plaintiff shall set out in his declaration or bill, as the case may be, with reasonable certainty, the work done, services rendered or materials furnished, the amount claimed therefor, the nature and substance of any contract made with such railroad company, or any contractor or construction company, or subcontractor, as the case may be, accompanying such declaration or bill, with a copy of the notice executed, as required in the first section of this act. And such suit shall be docketed and conducted as other suits in said courts."

The bill in this case by its averments fully complies with above directions of the act with regard to notice. G. H. Cole & Co., the subcontractors to whom the materials were furnished, are not made parties. The bill alleges that the Mason & Hoge Company had the contract originally with the railroad company to construct the Dossett tunnel. They sublet the work of construction to G. H. Cole & Co. as subcontractors, to which the railroad company agreed.

This latter company began the work of construction September 15, 1902, but failed to comply with the terms of their contract, and certain modifications of the contract were agreed upon between them and Mason & Hoge Company. G. H. Cole & Co. finally failed to carry out their contract and became wholly insolvent, so that, under the provisions of the contract between the two, the Mason & Hoge Company, on November 30, 1903, took charge themselves of the work. G. H. Cole & Co. voluntarily retired from the work, and delivered to Mason & Hoge Company all the materials then on hand, which had been furnished by complainants to the former company, and the latter company prosecuted the work to completion, completing it the 1st of April, 1905.

The bill exhibits an itemized statement of the account of materials, supplies, etc., furnished by complainants to G. H. Cole & Co., showing a balance due thereon and unpaid of \$10,506.45, and alleges that the whole of these were used in the construction of the tunnel, a part by G. H. Cole & Co., and the remainder by Mason & Hoge Company.

The railroad companies answer to the merits, and interpose no objection by demurrer or otherwise on account of the failure of complainants to make G. H. Cole & Co. parties. The Mason & Hoge Company, also, answer fully to the merits.

The railroad company holds a contract of indemnity from Mason & Hoge Company, and that company, in their answer,

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admit that certain portions of the materials furnished by complainants to G. H. Cole & Co., amounting to \$467.38, are liens. They tender this amount to complainants in full settlement of their claim. It being refused, the money is paid into court; and they deny that complainants are entitled to lien for any of the other articles.

While the act does not expressly provide that the party to whom the materials are furnished, the subcontractors, G. H. Cole & Co., in this case shall be made parties, the authorities are to the effect that this is necessary. In 2 Jones on Liens, § 1303, it is said:

"A subcontractor who holds an open, unsettled, or disputed account against the principal contractor should obtain an adjudication of this before seeking to establish a lien against the owner, or at the same time that he seeks to do so. He should either obtain a judgment against the contractor before bringing an action to enforce the lien, or he should make the contractor a party to that action. The burden of ascertaining whether there is any defense to the action ought not to be put upon the owner of the property. He is not presumed to have any knowledge upon the subject. Further than this, if the contractor establishes his lien against the property, and the owner is compelled to pay it, he has recourse on the principal contractor. He ought to be furnished with an adjudicated claim, and not with a mere open account."

In *Vreeland v. Ellsworth*, 71 Iowa, 347, 23 N. E. 374, it is said:

"We have the question whether a subcontractor, who holds an open, unliquidated, and unsettled account against the principal contractor, may bring his action against the owner of the building or improvement, and establish a mechanic's lien upon the property, without adjudicating the claim or attempting to adjudicate in any way against the contractor, who is the person primarily liable upon the account. We think this question must be answered in the negative. If the claim were liquidated, it may be the principal contractor would not be a necessary party. But that question we need not determine. This is an open, unliquidated account—a mere charge against the contractor. The burden of ascertaining whether there is any defense to the action ought not to be put upon the owner of the property. He is not presumed to have any knowledge upon the subject. Further than this, if the subcontractor establishes his lien against the property, and the owner is compelled to pay it, he has recourse on the principal contractor. He ought to be furnished with an adjudicated claim, and not with a mere open account."

To the same effect are the following: *May & Thomas Hardware Co. v. McConnell*, 102 Ala. 577, 14 South. 768; *Cumming v. Wright*, 72 Ga. 767; *Murdock v. Hillyer*, 45 Mo. App. 287;

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Ashburn v. Ayers, 28 Mo. 77; Estey v. Hallack, etc., Lumber Co., 4 Colo. App. 165, 34 Pac. 1113; Thompson v. Gilmore, 50 Me. 435.

In Warner v. Yates & Co., 102 S. W. 92, which was under chapter 67, p. 79, of the Acts of 1881, as amended by chapter 103, p. 207, of the Acts of 1889, construing that peculiar statute, it is said: "The principal contractor is a necessary party, because he is the debtor sued, and the owner of the property, because it is sought to reach his or her property. They are both interested, and must have their day in court; otherwise, there would be a failure of due process of law. The principal contractor has the right to controvert the indebtedness claimed, and the owner of the property the existence of the lien sought to be enforced, and the action cannot be maintained without establishing both the debt and the lien."

While it is true that G. H. Cole & Co. are proper parties, we think that the railroad companies have waived their right to make the question by answering to the merits, without making the objection by demurrer or otherwise.

It is insisted that the amendment to the answer makes the question, where it is denied "that the complainants have taken the necessary steps in this case to fix a lien in their favor upon respondents' railroad and property, and they deny that complainants have acquired or are entitled to any lien upon respondents' property for the payment of their alleged claim."

This is no more than a repetition of the denials of the answer as originally filed, which simply makes an issue upon the allegations of the bill as to whether the materials claimed were furnished to G. H. Cole & Co. for the construction of the tunnel, and were used for that purpose, whether the notice has been given as prescribed by the statute, whether the bill has been filed in time thereafter—in short, whether complainants had taken the proper preliminary steps prescribed in the act, so as to enable them to maintain a suit to enforce the lien.

Looking to these pleadings, and the decree of the chancellor, it does not appear that the question of the failure of complainants to first establish their claim against G. H. Cole & Co. by suit and judgment, or to make them defendants in this case, was made in the lower court, or directly raised or determined there; and it cannot be made in this court.

In addition to this, the evidence by complainants to show that the materials claimed were furnished G. H. Cole & Co. and by them used in the construction of the tunnel, was admitted without objection on the part of defendants.

In the case of Noll & Thompson v. Railroad, 112 Tenn. 140, 79 S. W. 380, it is held that the defects in a subcontractor's notice to a railroad of his lien, or the failure to give such notice,

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may be waived by defendant, and same is waived by not making the objection in the court below. It is said in that case:

"The object of the notice required by the statute is to appraise the railroad company of the amount claimed, and thus put it in a position where it can protect itself against overpayments of the original contractor. While it performs this important function, yet, like any other benefit, it may be waived by the party in whose interest it is created. And a waiver can very well be assumed unless a timely objection is made to the notice. Such objection, we think, comes too late when made for the first time on appeal."

It is next insisted that the decree of the chancellor is erroneous, because the chancery court has not acquired jurisdiction over the property of the railroad companies, and no authority to enforce any lien thereon, because complainants did not bring the property into the custody of the court by attachment or other appropriate process.

There is no provision in the act of 1891, and none in the act of 1883, requiring the issuance and levy of attachment on the property sought to be subjected.

The bill is framed in strict conformity with the provisions of sections 2 and 3 of the act. It describes the lines of railroad upon which the lien is sought as leading from Jellico, through the counties of Campbell, Anderson, and Knox, to Knoxville. The contract for the construction of a large part of this line was awarded to Mason & Hoge Company, who sublet a part of the construction to G. H. Cole & Co., including that portion of the road comprising Dossett's tunnel and its approaches thereto; the portion thus sublet lying in Anderson county.

The bill is sworn to, but no attachment is issued. No question is made in the answer with regard to the description of the property; and by the decree of the chancellor the lien is declared upon the property by substantially the description given in the bill.

Referring to creditor's bill to set aside fraudulent conveyances, where the court has proper service on defendant, it is said, in the case of *August & Bing v. Seeskind et al.*, 6 Cold. 173:

"Having thus, obtained jurisdiction, the court may rightfully proceed to decree upon the equity of the cause, and give such relief to the complainant as may be suitable to the equity alleged and established. If the subject-matter of the controversy be property of any kind, the court may decree such relief as may be proper to the equities of the parties, and execute such relief by process suitable to the purpose. Seizure of the property, pending the litigation, or at the beginning, is not generally essential to give the court jurisdiction over it and to enforce the proper relief in respect of it."

It is further said that if, during the progress of the suit, fear

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arises that the property may be wasted, upon proper showing the chancellor will issue process to seize and impound it. This is only auxiliary to the jurisdiction of the court. "But," as said, "it is not essential to the jurisdiction of the court, to enable it to proceed to decree upon the matter in controversy, that the property be seized or impounded."

The right of the court of equity to enforce a lien upon property without seizure by attachment is enforced in *Bryan v. Zarecor*, 112 Tenn. 511, 81 S. W. 1252, when the property is specifically described in the bill.

In *Central Trust Co. v. Condon*, 67 Fed. 106, 14 C. C. A. 314, the case was a bill to enforce a lien of subcontractors and materialmen under the act of 1883. The facts arose before the passage of the amendatory act of 1891. The bill set out the facts constituting the lien, and described the property, and prayed for a sale of the property. There was no attachment prayed for or issued. Judge Taft, speaking for the Court of Appeals of the Sixth Circuit of the United States, said: "It is clearly a suit to enforce a subcontractors' lien, for otherwise the court could not enforce it."

He further says: "The statute does not provide that an attachment should issue in suits to enforce railroad liens. It is true that under the mechanic's lien law of Tennessee the lien must be enforced by attachment, but this is because the section expressly requires it. There is no such provision in the railroad lien law. The lien of the principal contractor is to be enforced merely by suit, and the form of the declaration is prescribed in the statute. The lien of the subcontractor may be enforced by suit against the principal contractor as principal debtor and against the company as garnishee, but there is not a suggestion in the statute that attachments are necessary to the perfecting of a lien."

The uniform policy has been to give to the mechanic's lien law a liberal construction to carry out its purpose, and to secure and protect those entitled to the lien, and thereby to promote and encourage improvements. *Barnes v. Thompson*, 2 Swan. 215; *Alley & Burk v. Lanier*, 1 Cold. 541; *Kay v. Smith*, 10 Heisk. 42; *Steger v. Arctic Refrigerator Co.*, 89 Tenn. 453, 14 S. W. 1087, 11 L. R. A. 580; *Ragon v. Howard*, 97 Tenn. 341, 37 S. W. 236. In the last-named case it is said: "It is, and has been, the policy of our law to protect and enforce this lien of mechanics and furnishers, and not allow them to be defeated by any technical niceties of construction."

Without further discussion of the authorities, we think this first assignment of error by the railroad companies is not well taken, and the same is overruled. Upon final hearing the chancellor decrees that complainants are entitled to lien upon the

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property of the railroad for any dynamite, fuse, blasting powder, blasting wire, wire fuses, gasoline and gasoline torches, coal oil, nails, nuts and bolts, soft steel and iron, and building material for shanties for the men, shown on the account, but that complainants are not entitled to lien for any of the other articles set out in the account. As the parties cannot agree upon the value of the articles so declared liens, the cause is referred to R. H. Sansom, Esq., who is appointed special commissioner, or master, to report thereon.

It is further adjudged that complainants have a lien on the property of the railroad for the payment of what may appear to have been declared a lien upon the coming in of the report of the special master, notwithstanding the fact that they caused no injunction to be issued, and no attachment to be issued and levied on the property of the railroad.

The special master makes his report in accordance with this reference, which is confirmed, without exception by either side, by final decree in the cause; and it is decreed that complainant have a lien for the following:

Dynamite, fuse, blasting wire, and wire fuse	\$ 267 84
Gasoline	224 95
Gasoline torches	49 50
Coal oil	53 78
Nails, nuts, washers, bolts, soft steel, and iron	803 72
Building material for shanties	855 43
<hr/>	
Making total	\$2,255 22

The railroad companies are allowed 30 days in which to pay said amount into court, and upon default their property is decreed to be sold.

The second assignment of error by the railroad companies is with regard to the allowance of lien for the articles above referred to, aggregating \$2,255.22. While defendants contest lien for any amount upon their property, Mason & Hoge Company paid into court an amount to cover the first item above of \$267.84, and also \$201.72; the latter sum being that part of the item for nails, nuts, etc., of \$803.72, which they admitted are lienable. This thus leaves the remainder of that allowed by the chancellor to which defendants' assignment of error applies.

The assignments of error by complainants are with reference to the balance of their account, less the sum of \$1,848.07, which was for steel rails used in the construction of a tramway, but were not consumed in use; the claim being for all materials and supplies furnished G. H. Cole & Co. that were consumed in their use for the construction of the tunnel, which consist of all the other articles in their account, the subcontractor's plant and

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outfit, machinery, tools, etc., and repairs of same, and supplies for same.

It may be said that the assignments of error of both complainants and defendants relate to materials furnished for all these purposes, for some of which the chancellor allowed lien, and for some he did not.

The title to chapter 220, p. 296, of the Acts of 1883, is "An act to protect contractors, subcontractors, mechanics, laborers, and engineers who perform work or furnish materials for the construction or repair of railroads."

Chapter '98, p. 215, of the Acts of 1891, was to amend that act, as stated in its title, "providing a prior lien for and giving greater security" to the parties named therein. The portion of section 1 of this act necessary to be referred to in this connection is as follows:

"That section 3 of an act passed March 29, 1883, as referred to in the caption of this bill, the same being section 2778 of Milliken & Vertrees' Compilation of the Laws of Tennessee, be and the same is hereby amended so as to provide that hereafter every subcontractor, laborer, materialman or other person who performs any part of the work in grading any railroad company's roadway, or who constructs or aids in the construction or repairs of its culverts and bridges, or furnishes cross ties or masonry or bridge timbers for the same, which is used in the building and construction of such railroad, its bridges and culverts, or who lays or aids in the laying of its track, building of its bridges, the erection of its depots, platforms, wood or water stations, section houses, machine shops or other buildings, or for the delivery of material for any of these purposes, or for any engineering or superintendence, or who performs any valuable service, manual or professional, by which any such railroad company receives a benefit, all and every such person or persons shall have a lien on such railroad, its franchises and property, for the value of such work and labor done, or material furnished, or services rendered, as hereinbefore set out and specified, in as full and ample a manner as is now provided by law for persons contracting directly with such railroad company for any such work and labor done, or for material furnished. * * *"

As already stated, the material, supplies, etc., were furnished by complainants to G. H. Cole & Co., subcontractors under Mason & Hoge Company, and they were used and consumed in the construction, for the Knoxville, La Follette & Jellico Railroad Co., of the Dossett tunnel, a tunnel about 1,200 yards long, which required about three years for completion.

The lien is conferred alone by the act, and its language must, of course, control. The lien is given in favor of the material-

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man "for the delivery of material" to the subcontractor "who performs any part of the work in grading any railroad company's roadway, or who constructs or aids in the construction or repairs of its culverts and bridges, * * * or who lays or aids in the laying of its track."

In *Powder Co. v. Railroad*, 113 Tenn. 392, 83 S. W. 354, 67 L. R. A. 487, 106 Am. St. Rep. 836, it is held that explosives, furnished to G. H. Cole & Co., used in blasting in this Dossett's tunnel, are material for which the furnisher is entitled to lien. It is said: "The consumption of explosives is the only use that can be made of them, and their consumption is absolutely necessary to the excavation of tunnels through rock. In other words, they are material which enter into the building and grading of the road, as much so as trestles, bridges, and culverts contain materials which are necessary to the grading of the road at such places as require trestles and bridges and culverts."

We refer first to the building material furnished for the erection of shanties. These shanties were erected on lands adjacent to the right of way for the railroad, and upon lands leased for that purpose, and they were used for shelter for the workmen.

Upon the question as to whether the materialman has a lien for materials furnished in good faith to be used in the construction, but which in fact were not used, the court, in *Powder Co. v. Railroad*, 113 Tenn. 404, 83 S. W. 354, 67 L. R. A. 487, 106 Am. St. Rep. 836, cites the case of *Stewart Chute Lumber Co. v. Missouri Pacific Railway Co.*, 28 Neb. 39, 44 N. W. 48, decided by the Supreme Court of Nebraska, under the statute of that state somewhat similar to ours. The holding of that case is approved to the effect that the lien of the materialman attaches upon the delivery in good faith of the material to the subcontractor, and it is not necessary that the material furnished should have been actually used in the improvement.

This Nebraska case further held that lumber and other material furnished to the subcontractor for the erection of shanty boarding houses for the workmen and stables for the horses, erected adjacent to the right of way of the railroad, were liens under that statute. The decision in that case on this subject was by a divided court, and upon rehearing it was overruled by the opinion reported in 33 Neb. 39, 49 N. W. 769. This decision is based upon the particular language of the Nebraska statute. There the lien is given for material which "shall have been furnished or labor performed in the construction, repair and equipment of any railroad." The court says:

"These words do not include lumber, material, or labor which was not performed or furnished in the construction, repair, or equipment of the road. If this were not so, there would be no limit to the liability of a railway company. If, by a strained construction of the statute, the company is held liable for ma-

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terial used for shanties, it would by the same rule be liable also for food and clothing for the employees and feed for the teams; and it would be difficult to tell where its liability would cease. The lien is created by statute, and independently of that no cause of action exists against the company."

The court cites as in accord the case of *Dudley v. Railway Co.*, decided by the Supreme Court of Michigan, and reported in 65 Mich. 655, 32 N. W. 885.

The first decision in the Nebraska case is referred to in *Powder Co. v. Railroad*, as authority that the materialman is entitled to a lien for materials furnished in good faith to the subcontractor, whether they were actually used in the construction or not. The holding of the Nebraska case that there was a lien for the lumber furnished for the shanties and stables is referred to only incidentally.

The materials furnished for these shanties were not put upon the right of way of the railroad, and did not go into the construction thereof, and are not lienable material under the act.

The other articles for which the chancellor allowed lien are gasoline, gasoline torches, and coal oil. They were used for lighting the tunnel. The gasoline torches were used as small vessels to contain and utilize the gasoline; the work in the tunnel having been prosecuted day and night. The other articles, for which lien was denied, consist of packing, mattocks, cotton waste, electric light supplies, carts, tools, shovels, spades, blacksmith tools, wagons, scrapers, plows, machines, machinery, derricks, derrick crabs, cables, and repairs for all these.

Counsel for complainant in their brief say: "Confessedly the dynamite and the powder are liens; but the dynamite and powder could not be used without the drill to bore the hole in the rocks, and the drill could not be used without the engine and boiler, and the engine and boiler could not be used without the cotton waste and the lubricating oil. The cotton waste and the oil and the steel drills were all alike completely consumed in the use."

The contention is that complainants are entitled to lien for the articles referred to, because, from the character of the work of construction and the length of time required, they were necessarily consumed or destroyed in the use, some within a few hours or days, while some would last for months, and all were indispensable to the work.

The same principle can be as properly applied with regard to horses and mules that may be employed in hauling, which, on account of the hard and heavy draughts and long-continued work, are broken down and rendered worthless and useless. And thus the furnisher would have a lien on the railroad property for the whole outfit of the subcontractor, in addition to all the materials which were furnished for, or went into, the construction.

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This would be a construction of the act which extends far beyond the intention of the Legislature. The test is not whether the article furnished was consumed in its use, either instantly, as in case of explosives, or by degrees from long and hard use. If lien is allowed for tools and machinery, and horses and mules, for complete destruction, on the same principle it should be allowed for deterioration in value pro tanto, when not completely destroyed.

In *Powder Co. v. Railroad*, *supra*, the following is quoted from Elliott on Railroads: "But a lien cannot be obtained for machinery furnished to a contractor to be used in doing the work upon a bridge, under a statute authorizing a lien for all materials 'used in and about' the construction of a bridge."

In this connection it is said (pages 396, 397):

"All of the decisions upon this subject draw a clear distinction between the explosives and explosive supplies used in the construction of a railroad company's roadway, and which are necessarily consumed in the use thereof, and machinery and tools furnished for that purpose, which are held to be a part of the contractor's plant, and which do not go into the building of the roadway, but retain their identity and fitness for future use, saving the limited and gradual wear and tear incident to such use. The explosives which are necessarily consumed in the use are held to be liens, while the tools and equipment which constitute the contractors plant do not constitute liens under the several lien statutes."

There is cited in support of this the case of *Giant Powder Co. v. Oregon Pacific Railway Co.* (C. C.), 42 Fed. 474, 8 L. R. A. 700, distinguishing the case of *Basshor v. Railroad Co.*, 65 Md. 99, 3 Atl. 285.

Rapalje & Mack's Digest of Railway Law, vol. 6, p. 284, digests many cases upon this question, and lays down the rule as adjudged therein in the following language:

"In providing that a materialman shall have a lien for all materials furnished for, or used in and about, the construction of bridges; the law means such material as ordinarily enter into or are used in the construction of bridges, and are fairly within the express or implied terms of the contract between the owner and the contractor. It does not mean the machinery that may be used for the manufacture of the materials themselves.

"Where a contractor for building a bridge buys machinery for crushing stone to be used in the manufacture of artificial stone for the masonry work, and also appliances to carry the manufactured stone to the place where it is to be used, the seller of such machinery and appliances has no lien therefor under the provision of Maryland mechanic's lien law, which gives a materialman a lien for all materials furnished for, or used in and about, the construction of bridges."

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Section 3200, Rev. St. Mo. 1879 [Ann. St. 1906, § 4239], provides "that all persons who shall do any work or labor in constructing or improving the roadbed, rolling stock, station houses, depots, bridges or culverts of any railroad company, * * * and all persons who shall furnish ties, fuel, bridges or material to such railroad company, shall have * * * a lien," etc. In the case of *Central Trust Co. v. Texas & St. L. Ry. Co.* (C. C.), 23 Fed. 703, the United States Circuit Court held that "lubricating and illuminating oils are not 'materials,' within the meaning of section 3200 of the Missouri Revised Statutes, and parties furnishing them are not entitled to any statutory lien."

If the tools, carts, and machinery furnished as a part of the subcontractor's outfit are not lienable articles under the act, it follows that the repairs and appliances used or needed in operating same would stand on the same ground.

Lastly, lien is claimed for the table ware and commissary supplies.

It is claimed that these articles were necessary to afford to the workmen cooking stoves, table furnishings, and supplies in a commissary which was kept by the subcontractor, and the material furnished to the workmen in part payment for their labor.

Again, in *Powder Co. v. Railroad*, *supra*, the court adopts the language of the authority there cited, that "the food furnished a contractor for his workmen may be said to be 'used' and 'consumed' in the construction of the road on which they work, but this is only so in a remote and consequential way or sense. The food does not enter directly into the structure, and is not so used."

"In *Elliott on Railroads*, § 1068, it is said: "So, of course, groceries and food furnished for the workmen, while in a sense used in the construction of the road, are not materials which so enter into its construction that a lien can be based upon them."

The stove upon which to cook the food, and the table ware out of which to eat it, are too remote; and the Legislature did not intend to give lien for such. The same principle would apply to clothing furnished the workmen, bedclothing upon which to sleep, coal and wood for fires by which to warm, and it might be extended indefinitely to any number of luxuries.

The result of the above holding is that none of the materials included in the account of complainants, made exhibit to the bill, are lienable materials, excepting the items for dynamite, fuse, blasting wire, and wire fuse, and the items for nails, nuts, washers, bolts, soft steel, and iron, which went into the construction of the lining and approaches to the tunnel.

The cause is remanded to the chancery court, to be further proceeded with in accordance with this opinion. The costs of the appeal will be paid by complainants. The costs of the chancery court will be paid as adjudged by the chancellor.

MAYOR, ETC., OF JERSEY CITY *v.* NORTH JERSEY ST. RY. CO.

(Court of Errors and Appeals of New Jersey, July 2, 1907.)

[67 Atl. Rep. 113.]

Street Railroads—Operation.—The traction companies act of March 14, 1893 (P. L. 1893, p. 302; Gen. St. p. 3235), authorizes companies incorporated thereunder to acquire and operate actually existing street railways, whether or not they are at the time being operated with legal authority.

Statutes—Local and Special Laws—Constitutional Law.—Section 1 of the traction companies act of March 14, 1893 (P. L. 1893, p. 302; Gen. St. p. 3235, § 120), is a constitutional enactment.

(Syllabus by the Court.)

Error to Supreme Court.

Action by the mayor and aldermen of Jersey City against the North Jersey Street Railway Company. Judgment for defendant (63 Atl. 906), and plaintiff brings error. Affirmed.

George L. Record and *Gilbert Collins*, for plaintiff in error.

Frank Bergen and *Richard V. Landabury* (*Sherrerd Depue* and *William D. Edwards*, on the brief), for defendant in error.

SWAYZE, J. The city of Jersey City seeks by this action to eject the North Jersey Street Railway Company from a portion of Montgomery street. The railway company defends for that part of the street occupied by its street railroad, rails, ties, poles, and wires suspended thereon and used in the operation of its street railroad. A special verdict was found, upon which the Supreme Court ordered judgment for the defendant.

The street railroad was originally built by the Jersey City & Bergen Railroad Company, which was incorporated by a special charter in 1859 (P. L. 1859, p. 411). In 1893 this company leased its property to the Consolidated Traction Company, which was incorporated under the general act of March 14, 1893 (P. L. 1893, p. 302), for the formation of traction companies (Gen. St. p. 3235), and this company, in turn, leased the property in 1898 to the North Jersey Street Railway Company.

By the charter of the Jersey City & Bergen Railroad Company its corporate existence was limited to 25 years. An attempt was made to extend this term, first, in 1879, for 50 years, under the act of 1876 (P. L. 1876, p. 235; Gen. St. p. 972, §§ 302-304), and then, in 1902, perpetually, under the act of 1902 (P. L. 1902, p. 630). The original charter required that, in constructing the railroad through Jersey City, the consent of the common council of that city should first be obtained, and that was done.

The plaintiff's claim is that all right of the Jersey City &

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Bergen Railroad Company ceased with its corporate existence in 1884, and its franchise then lapsed, so that in 1893 its only property in the streets was the rails and ties.

The Supreme Court thought it unnecessary to decide this question, and found sufficient authority in the traction act of 1893 to sustain the defendant's claim.

We are sensible of the gravity of the case, which involves an important part of the railway system of the defendant company and the security of many millions of bonds, and involves, also, the rights of a great municipality in the public streets; but we should reproach ourselves if the importance of the case led us to regard the questions at issue in any other light than as pure legal questions. Legal principles are the same, whether the interests involved are great or small, and all cases are entitled to the same careful consideration.

The arguments of counsel were directed to points, some of which we think need not now be decided. Whether an action of ejectment will lie in a case like this where the municipality is not excluded from the locus in quo is a point not covered by our previous decisions; but, since the plea of the defendant is for the purposes of the action an admission of possession (Ejectment Act, § 13; Gen. St. p. 1284), this question may be eliminated, and the right of the city to maintain this action may for the purposes of the case be conceded.

We assume, also, in favor of the city that the consent required by the charter of the Jersey City & Bergen Railroad Company was limited to 25 years and expired in 1884, and that the attempt to extend the corporate existence would not even if successful operate to extend the period for which the consent of the city was available.

The question raised as to the constitutionality of the acts of 1876 and of 1902, authorizing the extension of corporate existence in case they are to be construed as continuing the powers given by the original charters, is of great importance. It probably affects many corporations of this state, and no opinion ought to be hazarded until the occasion absolutely requires. The view we take renders unnecessary an opinion on this point.

We agree with the Supreme Court that the right of the defendant is properly rested on the traction act of 1893. To vindicate that right, it is necessary to hold that the act properly construed applies to the case, and that it is a valid enactment within the constitutional limits of the legislative power. We must first determine what the Legislature meant, and then whether the method adopted to effectuate that intent was within its constitutional rights.

Stripped of the words unnecessary to be quoted for the present purpose, the first section authorizes corporations formed under

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the act to enter upon any highway upon which any street railway or other railroad operated as a street railway is or may be constructed, and to maintain and operate it with the consent of the owner and of the persons operating the same, to construct lines of street railway through any highway, either by extension of existing railways or by the building of new lines thereon, and to use and operate them when constructed. Two classes of highways are contemplated by the act—highways where there is already an existing street railway, and highways where new lines are to be constructed. In the first case the right is dependent upon the consent of those who own or operate the existing line; in the second case, upon the consent of the municipality. Since we assume in the present case that the consent originally given to the Jersey City & Bergen Company has lost its force, and no other consent of the municipality is shown, it is incumbent upon the defendant to bring Montgomery street within the first class, in which the statute authorizes it to operate upon obtaining the consent of the owner of an existing street railway. The question that arises is whether the statute refers to streets in which a street railway is actually operated or only to streets in which one is operated by legal authority.

The language of the act is in itself broad enough to include all existing street railways, whether or not they are operated as such with legal authority. That it was intended to include all street railways in actual operation is indicated by the use of express words, including railroads operated as street railways. There were in operation in Trenton and Atlantic City street railways operated by companies incorporated under the general railroad law. These railroads were without right in the streets. *Thompson v. Ocean City R. R. Co.*, 60 N. J. Law, 74, 36 Atl. 1087; *Tallon v. Hoboken*, 60 N. J. Law, 212, 214, 37 Atl. 895. They were actually operated, not as steam railroads, but as street railways, and were included in the act of 1893. The Jersey City & Bergen Railroad itself was incorporated as a railroad, with the power of eminent domain and the right to use other means of locomotion besides horses, which were then the usual means of traction employed by street railways. It comes within the statutory language of a railroad operated as a street railway. It is the actual operation which by the very words makes the statute applicable. This construction which makes the act of 1893 apply to all cases where the existing conditions were similar tends to make it general in compliance with the constitutional mandate, and is the construction which ought, therefore, to be favored, if there were an ambiguity in the words themselves. Besides the ordinary and natural meaning of the words and the need for generality in the legislation, other legislation indicates that it was the existence rather than the legality of the actual con-

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ditions that the Legislature had in mind. The first general act for the incorporation of street railway companies is the act of 1886 (P. L. 1886, p. 185; Gen. St. p. 3216, § 26). Section 24 of that act provided that no company not organized under a special charter or under the act itself, or then actually owning, controlling and operating a street railway, should thereafter construct or operate a street railway. This act recognized three kinds of street railways—those operated by companies with a special charter, those under the general law, and actual street railways operated by companies not incorporated either under special charter or the general law for that purpose, and hence without authority of law.

The reference to actual street railways in the act of 1886 is a distinct class from railways operated under a special charter or the general law is important because it indicates that, when the Legislature used the words "street railway," it must have looked rather to the actual facts than to the legal authority. The legal right might be only the property right in rails and ties, but the Legislature evidently thought those rails and ties might properly be called a "street railway." The language amounts to a legislative definition of those words. Such legislative usage corresponds, also, with the popular meaning. No one would hesitate to call by that name a line of road actually in use for the ordinary purpose of a street railway, whether operated by legal authority or not.

The Legislature itself has, moreover, removed all doubt on the subject by subsequent declaratory legislation. An act of 1896 (P. L. 1896, p. 357) enacts that any corporation attempted to be incorporated under the general railroad act prior to the passage of the general street railway act, which had actually constructed and had in operation a street railway, shall be deemed and taken to be a street railway company duly incorporated as such.

We may also confidently appeal to the well-known object of the traction act of 1893—an object apparent from its whole frame work. That object was to make possible the change in motive power from horses to other means of traction, especially electricity, the application of which to the purpose was then so recent. There is no reason to believe that the Legislature intended to make any distinction between lines of railway which were then actually serving the public and had the same need of improved methods of traction. Since 1893 there is no lack of reported cases where the rights of street railways have been in question. It is significant that the present question has not heretofore been raised.

If we entertained any doubt of the proper construction of the act of 1893, we should be reassured by the construction placed

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upon it by the public authorities of the city and state for 10 years after its passage. The special verdict shows that the street railway in question was assessed as main stem for the purpose of taxation under the railroad tax act of 1884 (P. L. 1884, p. 142) from that date until 1898, that annually since 1898 the tracks, ties, poles, wires, and appurtenances have been assessed by the taxing boards of Jersey City, and that from 1901 to 1904 the defendant has paid taxes under chapter 195 of the Laws of 1900 (P. L. 1900, p. 502), commonly called the "franchise tax act." The assessment of the tracks, poles, and wires may have been only an assessment of so much personal property, regardless of their value as a completed plant, and the franchise tax may have been assessable without regard to the legal right to maintain this particular portion of track, but the assessment as main stem under the act of 1884 could only be made against property used for railroad purposes, and such an assessment after the expiration of the charter of the Jersey City & Bergen Railroad Company is a pretty clear indication that the taxing authorities of the state thought there was something more to assess than the bare physical equipment of rails, ties, poles, and wires.

The city authorities brought an action against the Consolidated Traction Company to recover car license fees of \$10 per car per annum from September 25, 1893, to May 25, 1898. The city claimed these fees under the ordinance of 1859, by which consent was given to the construction of the Jersey City & Bergen Railroad. Although the action was not brought until 1903, and can, therefore, hardly be regarded as contemporaneous construction, it is proof that shortly before the present suit was brought the city authorities treated the railway as a street railway legally existing with the city's consent.

The plaintiffs attack the right of the Legislature to pass the traction act of 1893. It is not questioned that the Legislature has power to control the highways of the state, and may grant the use of them to street railway companies without the consent of the municipalities. The attack is upon two grounds: (1) That the act delegates to the owners, lessees, or operators of a street railway, whether legal or not, the power of creating a franchise to operate it perpetually, a power which the Legislature alone can exercise; (2) that it violates the constitutional provision against private, local, or special laws granting an exclusive privilege, immunity, or franchise, or granting the right to lay down railroad tracks.

The first objection overlooks the true source of the franchise. That source is the act of the Legislature, having plenary power in the matter, has seen fit to grant the right to enter upon highways where there is or may be hereafter an existing street railway upon condition that the consent of the existing railway shall

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be secured, just as it has granted the right in other highways upon condition that the assent of the municipality shall be secured. The courts are not concerned with the wisdom or lack of wisdom in imposing these conditions. It is enough for us that the Legislature, having power to grant without condition, has chosen to impose conditions which seemed to it to be proper. Such a condition as is now complained of has been sustained by the courts. *Morgan v. Monmouth Plank Road Co.*, 26 N. J. Law, 99; *In re Thirty-Fourth Street Ry. Co.*, 102 N. Y. 343, 7 N. E. 172; *In re Atlantic Ave. El. R. Co.*, 136 N. Y. 292, 32 N. E. 771.

The condition is not unlike that which requires the assent of owners of the abutting frontage before municipal action can be had favorable to the construction of the road. P. L. 1896, p. 329. This assent is required because of the special advantages and disadvantages which accrue to the abutting owners from street railways, and not because of any property interest in the street. *Montclair Military Academy v. North Jersey St. Ry. Co.*, 70 N. J. Law, 229, 57 Atl. 1050. The assent of an actually existing street railway may well be required, not only because of the special disadvantage to it, but because, even if it is without legal right to operate the road, it still has a property right in the rails, ties, poles, and wires, which even the Legislature cannot take away. *Cleveland Electric Railway Co. v. Cleveland*, 204 U. S. 116, 142, 27 Sup. Ct. 202, 51 L. Ed. —.

It was proper in all cases and necessary in the case of most of our streets, very few of which are wide enough for two sets of tracks, to require the consent of existing street railways, even though they were operating without legal authority, before the Legislature could exert its power to grant the right to the new company incorporated under the traction company act, but that consent is no more the source of the right than is the consent of abutting owners. The right comes from the legislative grant.

The objection to the constitutionality of the act goes deeper. It is urged that, in substance, a grant to a company organized under the traction act of 1893, conditioned upon the assent of the existing company, amounts to an extension of the right of the existing company to occupy the street, since all it need do is to cause a traction company to be organized in its own interest and under its own control and grant its consent to that company and no other. No doubt such a result is possible. The effect is to create an exclusive privilege in the public streets and a right to lay down railroad tracks indirectly, instead of directly. If the statute which authorizes and makes possible such a result is private, local, or special, it is in conflict with the Constitution. Is the act of 1893 of that character? Certainly not in form. The words of the statute are as general as possible. It authorizes any three persons to organize a traction company and

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to acquire the necessary consents. It applies to all streets and highways, and to all street railways existing at the time of the passage of the act or thereafter. To secure the right to lay tracks in streets where none exist, a route must be filed with the Secretary of State and the consent of the proper municipal authority secured. The privileges offered by the act are open to all. No law can secure to all equal ability to avail themselves of its privileges. This act gives all an equal opportunity. It is suggested that the privilege should be awarded in an open competition to the highest bidder, but that plan gives an advantage to the man with the longest purse. The plan offered by the law gives the advantage to him who is most diligent and expeditious in filing the route. The former plan may now seem in the light of the experience of 15 years to be the one that ought to have been adopted in the interest of our municipalities, but that is a question of expediency, which the Legislature had the right to determine. No matter how general may be the law granting rights, franchises, or privileges, there must be something to constitute an acceptance of the right. It may be the filing of a route under the general railroad law. It may be the organization of a company and the obtaining of municipal consent under the act for the organization of water companies, or the act for the organization of sewer companies. It may be as suggested a successful bid at a public auction. Upon compliance with the condition the right becomes exclusive, but the source of the right is the legislative enactment, and that is none the less general because only a few have the desire or the ability to avail themselves of its privileges. All that the Legislature is forbidden to do is to adopt an arbitrary standard for those who are authorized to obtain the offered privileges.

The requirement of the consent of the existing company does indeed give an advantage to that company, but it is an advantage arising naturally out of the actual situation, and not devised arbitrarily for the purpose of favoring one at the expense of another. The advantage not only arises naturally out of the actual situation, but, except in the case of streets wide enough for competing lines, is dictated by justice and the very necessity of the case; for the property right of an existing company, even though it be only a property in the physical equipment of the road, cannot be taken away.

The cases relating to the taking, cultivating, and planting of oysters are good illustrations of the legislative power. In the earliest case (*State v. Post*, 55 N. J. Law, 264, 26 Atl. 683), the court conceded that the state might grant an exclusive right to those who by occupancy, planting, or staking the ground had a meritorious ground for the grant, and held the act bad only because the privilege was limited to those who had planted and

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staked the grounds at the time of the passage of the act. Later legislation has been sustained in *State v. Corson*, 67 N. J. Law, 178, 50 Atl. 780, and *State v. Price*, 71 N. J. Law, 249, 58 Atl. 1015. The traction act of 1893 avoids the difficulty which arose in *State v. Post*, and applies to all highways in which a street railway is now or may hereafter be constructed, and the privilege offered is based upon the meritorious ground of an already existing right of property. The reason that existing street railways may benefit by the legislation now in question is that they alone have the qualities which make them susceptible of the benefit. All who possess the same qualities may receive the same benefit, as far as the statute has to do with it, and any difference arises, not out of the statute, but out of the prior situation.

The distinction made by the act between streets where a street railway exists, and those where there is none, is also a rational distinction, having in view the objects of the legislation. In order to prevent the seizure of streets at the will of the traction companies, conditions were interposed calculated to limit the streets to those in which there was or might reasonably be supposed to be some public need of a railway. As to streets in which a railway existed, that necessity might fairly be supposed to have been once determined, as in fact it had been in this very case. As to others the determination was left to a municipal body. We see no reason why the Legislature may not fairly base its action upon differences of character and needs already existing.

Numerous statutes have been sustained the object of which was to correct the defective execution of deeds or defective municipal action. *Den v. Downam*, 13 N. J. Law, 135; *State v. Newark*, 27 N. J. Law, 185, 196; *State ex rel. Walter v. Union*, 33 N. J. Law, 350, 355; *State (Vreeland) v. Bergen*, 34 N. J. Law, 438; *State (Kohler) v. Guttenberg*, 38 N. J. Law, 419; *Mutual Benefit Life Ins. Co. v. Elizabeth*, 42 N. J. Law, 235.

Such statutes operate to confer an exclusive privilege or even to make good a title to land, but the legislative power has never been doubted. Their justification is found in the meritorious ground of an already existing situation.

The fact that no question of the constitutionality of the act of 1893 for the reasons now urged has been raised heretofore, notwithstanding the activity of litigation with reference to street railways, is as potent an argument in favor of the constitutionality of the act as in favor of its construction to which we have already adverted. If the act were unconstitutional, the objection would certainly have occurred to the counsel who argued the case of *West Jersey Traction Co. v. Camden Horse R. R.*, 53 N. J. Eq. 163, 35 Atl. 49, and the great judge who delivered the opinion in that case. We think the act is constitutional.

The judgment should be affirmed, with costs.

TALYOR *et al.* v. SEABOARD AIR LINE RY.

(Supreme Court of North Carolina, Nov. 6, 1907.)

[59 S. E. Rep. 129.]

Nuisance—Private Nuisance—Exercise of Legal Right.—In an action against a railroad company for a nuisance, it is immaterial as affecting its liability whether it acquired its property by purchase or eminent domain.

Same.*—Noises of locomotives, shifting of cars, smoke, offensive odors, loading and unloading of freight, and the like, occasioned by and incident to the use and conduct of a railroad freight and passenger terminal, and resulting in damage to premises as a place of religious worship and residence of the pastor, do not constitute an actionable nuisance, where the railroad company conducts its operations with reasonable care.

Same.*—Though a railroad operated with reasonable care, however disagreeable it may be, is not an actionable nuisance, yet a railroad so operated as to needlessly cause injury and inconvenience is such a nuisance.

Same.*—The running of trains and shifting of cars on Sunday, at the time of the regular church services held on premises near the railroad freight and passenger terminal, does not per se constitute a nuisance, since under the express provisions of Revisal 1905, § 2613, a railroad company may operate its trains on Sunday; but it must further appear that the same was done in an unreasonable or improper manner.

Same—Actions for Damages—Damages.—Permanent damages to premises by a nuisance cannot be recovered, but the owners thereof may enjoin commission of the acts constituting the nuisance and recover the temporary damages sustained therefrom.

Same.—Trustees of a religious society cannot recover in an action for an alleged nuisance near premises used as the place of worship and residence of the pastor for any physical suffering by the pastor or persons composing the congregation.

Appeal from Superior Court, Granville County; Councill, Judge.

Action by L. C. Taylor and others against the Seaboard Air Line Railway for a nuisance. From a judgment for plaintiff

*See extensive note, 15 R. R. R. 519, 38 Am. & Eng. R. Cas., N. S., 519; Texas & Pac. Ry. Co. v. Edrington (Tex.), 25 R. R. R. 168, 48 Am. & Eng. R. Cas., N. S., 168; foot-notes appended to Southern Ry. Co. v. Commonwealth (Ky.), 23 R. R. R. 370, 46 Am. & Eng. R. Cas., N. S., 370.

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overruling defendant's demurrer to the complaint, defendant appeals. Reversed and remanded, with directions.

Day, Bell & Allen and Braham & Devin, for appellant.

B. S. Royster and T. Lanier, for appellees.

BROWN, J. It appears from the complaint that plaintiffs are the trustees of the Oxford Presbyterian Church, situated, with the manse for the use of the pastor, on the east side of Gilliam street, and that the congregation for which they are trustees have been using the property for religious purposes since 1833. The complaint alleges that defendant operates a line of railway to the town of Oxford, and that the terminus of the said line of railroad is within the corporate limits of the said town, and very near the center thereof; that the freight depot and passenger station of the said railroad, which are used, operated, and controlled by the defendant, are on the west side of said Gilliam street, and nearly opposite to the said church building and dwelling, and the tracks of the said railroad leading to the said freight depot and passenger station cross said Gilliam street very near said church and dwelling. Plaintiffs further aver that, in the use and operation of the said railroad, freight depot, passenger station, and tracks thereon, the defendant has wantonly and negligently created, maintained, and permitted its terminal premises contiguous to the plaintiff's lot and on the opposite side of the street therefrom, such nuisance as to greatly endamage the church and manse, and to render them less valuable as a place of worship and residence. The pleader then sets out specifically the particular acts constituting the alleged nuisances: (1) By the ringing of bells, sounding of whistles, blowing off of steam and the loud puffing of engines, and by smoke, cinders, soot, dust, and foul, noxious, and offensive odors from defendant's engines, being operated on its tracks. (2) By odors from cars of fertilizer being moved about and left remaining on the terminal tracks. (3) By the maintenance and use of a freight and passenger depot so near the plaintiff's property that the smoke, odors, noise, and vibrations from its engines and trains are annoying to the congregation and occupants of the parsonage. (4) By blocking Gilliam street with trains very near the church and dwelling, and obstructing the passage of the members of the congregation desiring to attend church and the children going to Sunday school. (5) By loading and unloading circuses on defendant's tracks near the plaintiffs' property. (6) By running trains and shifting cars on Sunday near the plaintiffs' church, and at the time of their regular services. The complaint further alleges that, by reason of the nuisances aforesaid, the said church and dwelling have been greatly and most seriously damaged as a place of worship and for a residence, to wit, damaged in the sum of \$5,000.

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The plaintiffs do not seek to enjoin defendant from the use of its terminal station, but to recover permanent damage once for all for the diminution in the value of their property caused by the propinquity of the terminal and the manner of its use. It is alleged that the defendant acquired its terminal property by purchase, and not by condemnation. It is immaterial so far as it affects the rights and liability of a railway corporation how it acquired its property, whether by purchase or under the exercise of the delegated power of eminent domain. It holds the same rights, is subject to the same governmental regulation, and incurs the same liabilities to the public in either case. The principal legal propositions presented on this appeal were very fully and recently considered by this court in the Thomason Case, 142 N. C. 322, 55 S. E. 205, and the law of nuisance as applicable to railroads is there elaborately discussed by Mr. Justice Connor. Applying the principles of law as there laid down to the facts as stated in the complaint, we are of opinion his honor erred in overruling the demurrer. The several alleged acts charged against the defendant are well within its chartered powers, provided they are performed with reasonable care. It is out of the question in this advanced age to apply to railways, our great arteries of commerce, the doctrines of the common law in relation to nuisances. As an eminent judge has recently said: "A rigid enforcement of rules and definitions announced in an age that knew nothing of locomotives and blast furnaces would have stopped the wheels of commerce, put out the fires of furnaces, and silenced the rattle of manufactories." Simmons, C. J. in *Austin v. Terminal Co.*, 108 Ga. 687, 34 S. E. 852, 47 L. R. A. 755. We live in an age of progress which requires the modification of old rules and their judicious application to changed conditions. Personal interests and comfort must yield to public necessity or convenience. To deny to the defendant the use of its road and terminal would be to exclude all railroads from our cities and towns. The extension of such a ruling would stop all machinery driven by steam and restrain the use of coal because of its annoying smoke. There are thousands of manufacturing plants, mills, and other kindred establishments in the cities and town of this country about which no complaint has been made in the courts which would have been adjudged actionable nuisances according to the old view of such structures. We cannot afford to silence the hum of industry or destroy the city that has grown up around the loom. In the Elevated Railroad Cases abutting property owners recovered permanent damage arising from smoke and noise, but upon the sole ground that the elevated structures invaded the owner's easement of light and air, and greatly interfered with means of access to his property. Speaking of those cases, the Supreme Court of Georgia

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says: "But in no case has the owner of property on a cross-street or a parallel street, no matter how close to the elevated road, been held entitled to recover, so far as we have found. And yet it is almost certain, on a business proposition, that persons owning property abutting on cross-streets have found their property depreciated in value as a result of the construction and operation of the elevated roads." *Austin v. Terminal Co.*, *supra*. In this complaint there is no allegation of any physical interference with plaintiff's property by defendant from which damage may flow, as in the Elevated Cases. It is therefore manifest from an unbroken line of precedents that the mere establishment and proper use of a freight and passenger station across the street from plaintiffs' property does not constitute an actionable nuisance. Having been established by authority of law, all damage that flows from its reasonable and proper use is *damnum absque injuria*. 2 Elliott on R. R. 718; 2 Wood on Nuisance, § 753; R. R. & Banking Co. v. Maddox, 116 Ga. 64, 42 S. E. 321; 19 Am. & Eng. (1st Ed.) 923, 924, and cases there collected. And it further follows that injuries and inconveniences to those who reside near this terminal from noises of locomotives, shifting of cars, loading and unloading freight, smoke and the like, which result from the necessary, and therefore proper, use and conduct of the terminal, are not actionable nuisances, but are the necessary concomitants of defendant's franchise. Wood, R. R. p. 722; *Beseman v. Railroad*, 50 N. J. Law, 235, 13 Atl. 164; *R. R. v. Speer*, 56 Pa. 325, 94 Am. Dec. 84.

While we hold that a railway lawfully operated with reasonable care, however disagreeable it may be to the residents of the neighborhood, is not an actionable nuisance, we are far from holding that it cannot be so operated and conducted as to become one. The Baptist Church Case, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739, is a weighty and often cited authority illustrative of the lawful and unlawful use of railroad property. The railroad had located an engine house away from its business terminal, close under the eaves of the church windows, and had erected 16 smokestacks lower than the church windows, almost up against them, and so constructed that the volume of smoke from each stack poured directly into the body of the church. The Supreme Court of the United States applied the law of nuisance wholly independent of reasons of public policy and business convenience, for no such considerations required the construction of a roundhouse immediately under the eaves of a church. But in that case the court holds that for all usual and necessary noises and inconveniences occasioned by the operation of the railway, as such, in the discharge of its public duty, a property owner cannot recover. When railroads so conduct their operations that they needlessly and heedlessly cause suf-

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fering and inconvenience, their statutory authority will not protect them. Such grant of power does not give railway corporations an unbridled license to use their own property as they please without consideration for the rights and property of others. If it did, then, instead of being the servants of the public, they would be its masters. Railroad companies have been held liable for creating an actionable nuisance in using defective engines, which scatter great and unnecessary quantities of sparks, cinders, and smoke, for continued and unnecessary noises and disturbance from shrieking whistles and hissing steam, for maintaining their stations, depots, and cattle yards in a filthy condition, for maintaining coal shutes and roundhouses at improper places, and operating them so carelessly and noisily as to create a nuisance. In such and other like contingencies their charters afford them no protection.

Speaking of a railway terminal becoming a nuisance, the Supreme Court of Georgia says: "Although properly constructed, its negligent and improper operation might produce noises, smoke, cinders, etc., largely in excess of what would result from its proper operation, and thus create specific nuisances which the plaintiff might enjoin." *Railroad v. Maddox, supra*. In their complaint these plaintiffs have specified as actionable nuisances those general things which the defendant under its charter has the right to do, without stating in any particular wherein the defendant has done them in an unnecessary, improper, and unlawful manner, thereby exceeding its chartered powers. The defendant may do these lawful acts in an unlawful manner, and, if so, it may commit an actionable nuisance, but, if it performs them in a proper manner, the act is lawful, and not actionable, although disagreeable. The complaint should have pointed out in a specific manner the particulars wherein the defendant has exceeded its legal authority. "A complaint which alleges negligence in a general way, without setting forth with some reasonable degree of particularity the things done, or omitted to be done, by which the court can see that there has been a breach of duty is defective and open to demurrer. While pleadings are to be liberally construed, they are to be so construed as to give the defendant an opportunity to know the grounds upon which it is charged with liability." *Thomason v. Railroad, supra*. For instance, the complaint charges as nuisance the running of trains and shifting of cars on Sunday at the time of the regular church services. As set out in the complaint, these acts do not per se constitute an actionable wrong, for the statute expressly confers upon railway companies the right to operate their passenger, express, and mail service on Sunday, as well as freight trains run for the purpose of transporting fruits, vegetables, live stock, and perishable freight. And when there are not

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sufficient cars of live stock or other perishable freights to make a complete train, or section of a train, the company may add cars loaded with other freight to complete it. Revisal 1905, § 2613. The loading and unloading of freight trains on Sunday is expressly prohibited, and consequently the shiting and moving of freight cars on that day would be unnecessary, unless they should be in the way of a passenger train, and this should be anticipated and guarded against as much as possible. The complaint should specify wherein the defendant is violating the statute, and wherein it is creating an unnecessary and unjustifiable noise and disturbance on the Sabbath Day.

In our view of the law, the plaintiffs cannot in any event recover permanent damage for the depreciation of their property by reason of the establishment of the railway terminal on Gil-liam street opposite it. If they can allege and prove unlawful and unwarranted acts and conduct by defendant in the management of its terminal which amount to a nuisance, they may en-join the further commisison of such acts, as well as recover such temporary damage as their property has sustained thereby. As trustees they could not recover for any physical suffering upon the part of their pastor, his family, or the individuals composing the congregation. As the case is to be remanded, we will direct that plaintiffs have leave to replead, and file another complaint, if so advised, and, if not advised, the case will be dismissed.

Reversed.

MILTON *v.* BANGOR RY. & ELECTRIC CO.

(Supreme Judicial Court of Maine, Nov. 26, 1907.)

[68 Atl. Rep. 826.]

Street Railroads—Acceptance of Franchise—Effect—Negligence.—Whenever a franchise or right coupled with a corresponding duty is conferred by the Legislature upon a person or corporation and is accepted, such person or corporation is answerable by the common law to a third person who sustains damage by the neglect of that duty.

Same—Negligence—Failure to Repair Streets.—An acceptance by a street railway company of a franchise to occupy portions of the streets of a town with its railroad, coupled with the duty of keeping such portions of the streets in repair, gives a right of action against the company by a traveler injured by its neglect of that duty.

Constitutional Law—Legislative Powers.—The people of the state have not given the Legislature power to exempt any particular person or corporation from the operation of the general law of the state or to impose special conditions or limitations upon rights of action against a particular person or corporation.

Same—Discrimination.—An act of the Legislature that no action shall be maintained against a particular street railway company therein named for injuries caused by its neglect of duty to keep in repair those parts of the street of a town occupied by its railway, unless one of its directors had 24 hours' actual prior notice of the defect and subsequent notice of the injury within 14 days, is to that extent unconstitutional and void.

(Official.)

Report from Supreme Judicial Court, Penobscot County.

Action by Edward J. Milton against Bangor Railway & Electric Company. Case reported. Judgment for plaintiff.

Action on the case to recover damages for injuries to the plaintiff's horse and harness caused by an alleged defect in a crossing over the defendant's tracks in the city of Old Town. After the evidence was taken out, it was agreed to report the case to the law court for decision in accordance with the stipulations hereinafter stated.

The report, among other things, alleges as follows: . .

"Plaintiff offered evidence to show a defective crossing over said defendant's tracks at the junction of Elm street and Stillwater avenue, in the city of Old Town; that said defect was due to the defendant's negligence, and that his own negligence did not contribute to his injury. It was admitted by defendant that it owned and operated the line of electric road between Bangor

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and said Old Town at the point where and at the time when the plaintiff suffered injury to his horse and harness. Plaintiff admitted that the Bangor Railway & Electric Company was the successor of Bangor, Orono & Old Town Railway Company.

"Defendant moved for a nonsuit, on the ground that the plaintiff had failed to prove that the defendant had 24 hours' actual notice of the defect causing plaintiff's injury, or that within 14 days thereafter he had given notice thereof to the directors of the defendant corporation.

"Defendant claimed this right of notice by virtue of chapter 116, p. 198, Priv. & Sp. Acts 1891, entitled 'An act to incorporate the Old Town, Orono & Veazie Railway Company;' section 3 of said act providing, in part, as follows: '* * * Said corporation shall be liable for any loss or damage which any person may sustain by reason of any carelessness, neglect or misconduct of its agents or servants, or by reason of any defect in so much of said streets or roads as is occupied by said railroad if such defect arises from neglect or misconduct of the corporation, its agents or servants; and in actions brought against the company to recover damages by reason of such defects, the plaintiff shall have the rights and be subject to the burdens of proof and limitations and conditions provided by the general statutes applicable to suits for such causes against towns as now existing, the directors of said company standing in this respect in place of town officers.'

"It was admitted that the existence of this right in the defendant depended upon the construction of chapter 495, p. 809, Priv. & Sp. Acts 1889, entitled 'An act to incorporate the Old Town Street Railway Company;' chapter 116, p. 198, Priv. & Sp. Acts 1891, before recited; section 27 of chapter 53 of the Revised Statutes; chapter 559, p. 863, Priv. & Sp. Acts 1893, entitled 'An act to change the name and amend the charter of the Old Town, Orono & Veazie Railroad Company;' chapter 111, p. 136, Priv. & Sp. Acts 1895, entitled 'An act to amend the charter of the Bangor, Orono & Old Town Railway Company;' and chapter 46, p. 52, Priv. & Sp. Acts. 1905, entitled 'An act to confirm the organization of the Old Town Electric Company, to change its name to Bangor Railway and Electric Company, and to authorize it to acquire the properties and franchises of the Public Works Company, the Bangor, Orono and Old Town Railway Company and the Bangor, Hampden & Winterport Railway Company, and to confer certain powers upon said Bangor Railway & Electric Company.' (Here follows various excerpts from the acts and statutes mentioned in the preceding paragraph, and also an admission in relation to a certain lease between the Old Town, Orono & Veazie Railway Company and the Old Town Street Railway Company for the term of 999 years.)

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"It was admitted that the Bangor Railway & Electric Company accepted the franchise conferred by this act (Priv. & Sp. Laws 1905, p. 52, c. 46); that special meetings of the stockholders and directors of the Bangor, Orono & Old Town Railway Company were duly called and held on the 7th day of April, 1905, and that at such meetings it was unanimously voted to merge the Bangor, Orono & Old Town Railway Company into the Bangor Railway & Electric Company; and that for this purpose by a deed of indenture dated April 7, 1905, duly executed and delivered, the Bangor, Orono & Old Town Railway Company did sell, and the Bangor Railway & Electric Company did purchase, all the property of said Bangor, Orono & Old Town Railway Company, including 'rights, privileges, immunities and franchises.'

"It was agreed that the case should be reported to the law court for its decision. If the court shall hold that under the various legislative enactments herein set forth defendant's liability for plaintiff's injuries, caused by defect in a public way, and due to its negligence, is conditioned upon 24 hours' actual notice of said defect prior to said injuries, and upon notice given by the plaintiff to the directors of the defendant corporation within 14 days after said injuries, judgment to be for the defendant; otherwise for the plaintiff in the sum of \$50."

The case sufficiently appears in the opinion.

Argued before EMERY, C. J., and WHITEHOUSE, SAVAGE, PEABODY, and SPEAR, JJ.

Waterhouse & Crawford, for plaintiff.

E. C. Ryder, for defendant.

EMERY, C. J. The Old Town, Orono & Veazie Railroad Company, incorporated in 1891 by chapter 116, p. 198, Special Laws 1891, received authority to occupy portions of the streets of Old Town with its railroad tracks, etc., but coupled with the duty of keeping and maintaining in repair all such portions and of making all other repairs of such streets which should be rendered necessary by the occupation of them by its railroad. Sections 1 and 2 of the charter. Under this charter that company constructed its tracks and operated its railroad through various of the streets of Old Town. Its property, franchise, and duty subsequently passed by various conveyances and legislative acts to the defendant company, which since 1905 has maintained the tracks and operated the railroad through the same and other streets of Old Town.

The plaintiff, while traveling in 1906 with his horse and carriage through the streets of Old Town, suffered an injury to his horse and harness through a defect in a crossing over the defendant company's tracks at a junction of two streets which de-

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fect was due to the defendant company's neglect of its duty under its charter. The plaintiff was without fault, and has not been compensated.

For defense the defendant company relies solely upon the following provisions in section 3 of the original charter of 1891, viz.:

"Said corporation shall be liable for any loss or damage which any person may sustain by reason of any carelessness, neglect or misconduct of its agents or servants, or by reason of any defect in so much of said streets or roads as is occupied by said railroad if such defect arises from neglect or misconduct of the corporation, its agents or servants; and in actions brought against the company to recover damages by reason of such defects, the plaintiff shall have the rights and be subject to the burdens of proof and limitations and conditions provided by the general statutes applicable to suits for such causes against towns as now existing, the directors of said company standing in this respect in place of town officers."

To maintain a suit for such a cause of action against a town, it must be made to appear that one or more of certain specified town officers had actual notice of the defect 24 hours before the injury was received from it, and within 14 days after the injury received notice thereof from the plaintiff. There being no evidence to the contrary, it must be assumed that no director of the defendant company had any such notice of the defect or of the injury. The defendant contends that the right of action against it for damages thus caused by it is a creature of the statute cited, and is limited to cases stated in that statute, viz., to cases where a director had the 24 hours' previous notice and the subsequent 14 days' notice.

This contention cannot be sustained. The plaintiff has a common-law right of action, independent of the statute. There was granted by the state to the defendant company a right, a franchise, to occupy portions of the streets, but coupled with the corresponding duty of keeping them in repair. The duty was prescribed for the protection of the traveling public. It was voluntarily assumed along with the right, and with it was assumed the necessary concomitant of a common-law liability to any of the traveling public suffering injury through its breach. The assumption of the duty creates the liability and the consequent right of action in favor of those persons for whose protection the duty was prescribed. *Veazie v. Penobscot R. R. Co.*, 49 Me. 119; *Tobin v. P. S. & P. R. R. Co.*, 59 Me. 183, 8 Am. Rep. 415; *Gillett v. Western R. R. Corp.*, 8 Allen (Mass.) 560; *Gates v. Pennsylvania R. R. Co.*, 150 Pa. 50, 24 Atl. 638, 16 L. R. A. 554. "At common law, whenever a right is conferred and a corresponding duty imposed upon a person or corporation, it is answerable to a third person who sustains damage by the neg-

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igent discharge of that duty." *Mann v. Central Vermont R. R. Co.*, 55 Vt. 484, 487, 45 Am. Rep. 628.

This principle is affirmed in the case of street railroads, ex majore cautela, by our general statutes, Rev. St. c. 53, § 27.

"All street railroad corporations shall be liable for any loss or damage which any person may sustain by reason of any negligence or misconduct of any such corporation, its agents or servants, or by reason of any obstructions or defects in any street or road of any city or town, caused by the negligence of such corporation, its agents or servants."

Of course, municipal corporations which act in the care of the streets, as governmental agencies, as trustees for the public, are not within this common-law rule. The distinction and the reasons for it are familiar, and need no new statement. *Riddle v. Proprietors*, etc., 7 Mass. 169, 5 Am. Dec. 35.

The defendant further contends, however, that, if the Legislature did not create the plaintiff's right of action, it has by the words of the charter quoted above exempted the defendant company from liability for injuries caused by its negligent performance of its duty of keeping the streets in repair, unless some one of its directors had 24 hours' previous notice of the defect, and received notice of the injury within 14 days afterwards. To this claim of exemption the answer should be apparent. The people have not conferred upon the Legislature the power to exempt any particular person or corporation from the operation of the general law, statutory or common. *Holden v. James*, 11 Mass. 396, 6 Am. Dec. 174; *Simonds v. Simonds*, 103 Mass. 572, 4 Am. Rep. 576; *Lewis v. Webb*, 3 Me. 326; *Durham v. Lemiston*, 4 Me. 140. In *Lewis v. Webb*, *supra*, the court, per Mellen, C. J., said: "On principle, then, it can never be within the bounds of legitimate legislation to enact a special law, or pass a resolve dispensing with the general law in a particular case, and granting a privilege and indulgence to one man by way of exemption from the general law leaving all other persons under its operation."

We have no occasion to consider whether the attempted statutory exemption is forbidden by the fourteenth amendment to the United States Constitution, or by section 19 of the Maine Declaration of Rights, which declares that "every person for an injury done him in person, reputation, property or immunities shall have remedy by due course of law." *Preston v. Drew*, 33 Me. 558, 54 Am. Dec. 639; *Bennett v. Davis*, 90 Me. 102; 37 Atl. 864. It sufficiently appears without reference to those constitutional provisions that despite the provisions of its charter the defendant company is not exempt from liability for the consequences of its negligence in the performance of the duty it assumed, and that the plaintiff is entitled to judgment according to the stipulations in the report, to wit, for \$50.

Judgment for the plaintiff for \$50.

HOUSTON & T. C. R. Co. *v.* STATE.

(Supreme Court of Texas, Feb. 12, 1908.)

[107 S. W. Rep. 525.]

Railroads—Stations—Care of Water-Closets.*—So much of act April 17, 1905 (Acts 1905, p. 324, c. 133), as requires railroads to keep their water-closets at passenger depots in a reasonably sanitary condition and lighted at night, and imposing a penalty for failure to do so, is valid, when applied to existing closets, though unconstitutional as to that part requiring railroads to construct closets.

Certified Questions from Court of Civil Appeals of Third Supreme Judicial District.

Action by the state against the Houston & Texas Central Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed in Court of Civil Appeals, 103 S. W. 449, and questions certified to the Supreme Court. Questions answered.

Baker, Botts, Parker & Garwood, Wm. O. Bowers, and Jno. C. Box, for appellant.

Emil Simmang, R. W. Harris, and Rector & Watson, for the State.

GAINES, C. J. This is a certified question. The state sued the Houston & Texas Central Railroad Company to recover penalties denounced by the act of April 17, 1905 (Acts 1905, p. 324, c. 133), which requires of railroad companies that water-closets be erected and maintained at their passenger depots, and be kept lighted at night, and in a cleanly condition. Upon the trial of the case there was evidence tending to show that at the time the statute went into effect the defendant company had a water-closet at its depot in the town of Giddings, but that it thereafter failed to keep it clean and in proper sanitary condition, and that it failed to keep it lighted. There was a verdict and judgment for the state.

The questions certified are: "(1) Did we, in our opinion, correctly construe the opinion of the Supreme Court in the case mentioned? *M., K. & T. Ry. Co. v. State*, 100 S. W. 768, 17

*For the authorities in this series on the constitutionality of statutes prescribing penalties to compel common carriers to perform their duties to the public, etc., see foot-notes appended to *Lexington Grocery Co. v. Southern Ry. Co.* (N. Car.), 14 R. R. R. 349, 37 Am. & Eng. R. Cas., N. S., 349, where all the preceding ones are collected; foot-notes appended to *Osteen v. Southern Ry.* (S. Car.), 25 R. R. R. 300, 48 Am. & Eng. R. Cas., N. S., 300; foot-notes appended to *Stone & Co. v. Atlantic Coast Line Ry. Co.* (N. Car.), 23 R. R. R. 420, 46 Am. & Eng. R. Cas., N. S., 420.

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Tex. Ct. Rep. 936. In other words, did we correctly limit that opinion as a holding merely to the effect that the statute construed was unconstitutional or inoperative in so much of it as required the railway companies to construct water-closets? (2) For fear that we may not have the authority to ask the Supreme Court to construe one of its opinions, we pointedly ask the question whether, for the reasons stated in the opinion referred to by the Supreme Court, the entire act is unconstitutional. In other words, can it be enforced on the ground of the failure of the railway company to keep an already existing closet in a proper sanitary condition and properly lighted?" In the case of the Missouri, Kansas & Texas Ry. Co. v. State of Texas, 100 S. W. 768, 17 Tex. Ct. Rep. 936, we held that by reason of the fact that the act did not prescribe a time in which the water-closets should be constructed, and did not allow a reasonable time for doing the work, so much of the act as denounced a penalty for a failure to provide such structures was inoperative and void. The decision was clearly limited to this question, and that was all that was decided. The reason for that holding was that it would require some considerable time to construct the water-closets, and since a reasonable time was not allowed for doing the work the act was invalid. This reason does not apply where the railroad already has closets in existence, and the question is as to the failure to keep them clean or to light them. No reason is seen why a water-closet could not be made clean and lighted at once.

It follows that we are of the opinion that the entire act is not unconstitutional, and that it can be enforced for a failure to keep an existing closet in a proper sanitary condition and properly lighted.

COFFEY & RIGBY *v.* ATLANTIC COAST LINE R. Co.

(Supreme Court of South Carolina, Feb. 22, 1908.)

[60 S. E. Rep. 447.]

Carriers—Freight—Failure to Adjust Loss—Penalty—Constitutionality of Statute.*—Act 1903 (24 St. at Large, p. 81), providing a penalty to be paid the consignee by a carrier for failure to adjust and pay within a certain time a claim for loss of freight while in its possession, is constitutional.

Appeal from Common Pleas Circuit Court of Clarendon County; George E. Prince, Judge.

Action by Coffey & Rigby against the Atlantic Coast Line Railroad Company. From a judgment for plaintiffs, defendant appeals. Affirmed.

J. T. Barron and Purdy & O'Bryan, for appellant.

Davis & Weinberg, for respondents.

WOODS, J. The plaintiff recovered judgment in the court of common pleas for Clarendon county for \$231.64, the value of one mule short in a carload of live stock shipped from St. Louis, Mo., to the plaintiff at Manning, S. C., interest thereon, and the statutory penalty of \$50. The defendant appeals solely on the ground that the penalty statute of 1903 (24 St. a Large, p. 81) is unconstitutional. The question has been settled by the case of *Charles v. Railroad Co.*, 78 S. C. 36, 58 S. E. 927.

The judgment of this court is that the judgment of the circuit court be affirmed.

*See preceding case, and foot-note.

DE LORME v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina, Feb. 25, 1908.)

[60 S. E. Rep. 440.]

Carriers—Actions for Loss of Freight—Issues—Liability of Connecting Carriers.—Where, in an action against a carrier for loss of freight, the undisputed evidence showed that the goods were delivered to the carrier, and that the loss accrued while in its possession, the liability of a connecting carrier was not involved, and the validity of Act May 13, 1903 (24 St. at Large, p. 1), defining connecting carriers, and fixing their liabilities, was not in issue.

Commerce—Interstate Commerce—Regulations—Validity.*—Act Feb. 23, 1903 (24 St. at Large, p. 1), imposing a penalty on a carrier failing to adjust and pay within a specified time a claim for loss of freight while in its possession, is not unconstitutional, as an interference with interstate commerce.

Carriers—Loss of Freight—Evidence—Sufficiency.—Where, in an action against a carrier for loss of freight, the original bill of lading showed receipt of six boxes of goods consigned to plaintiff, and the carrier's receipt to plaintiff for freight charges on five of the boxes acknowledged a shortage of one box, for loss of which the action was brought, the evidence showed that the loss occurred while the goods were in the carrier's possession.

Appeal from Common Pleas Circuit Court of Clarendon County; R. W. Memminger, Judge.

Action by M. D. De Lorme against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

J. T. Barron and Purdy & O'Bryan, for appellant.

Davis & Weinberg, for respondent.

JONES, J. This is an appeal by defendant from a judgment of the circuit court affirming the judgment of a magistrate for loss of freight while in the possession of the defendant, \$7.13, and the statutory penalty, \$50, for failure to adjust the loss within 90 days.

Appellant, under its first exception, endeavors to raise the question as to the constitutionality of the act approved May 13, A. D. 1903 (24 St. at Large, p. 1), entitled "An act to further define connecting lines of common carriers and to fix their liabilities." There is, however, no basis for the exception in the record. No liability of a connecting carrier is involved; the un-

*See preceding case, and foot-note.

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disputed evidence being that the goods were delivered to defendant, and the loss accrued while in defendant's possession.

Under the second exception appellant assails the constitutionality of the penalty statute approved February 23, 1903 (24 St. at Large, p. 81), entitled "An act to regulate the manner in which common carriers doing business in this state shall adjust freight charges and claims for the loss of or damage to freight." This question is settled against appellant by the case of *Charles v. Atlantic Coast Line R. R. Co.*, 78 S. C. 36, 58 S. E. 927, which has been approved in other cases.

The remaining exceptions, alleging the total absence of evidence to sustain the judgment, cannot be sustained. The original bill of lading, introduced in evidence, showed receipt by defendant of six boxes of crackers consigned to plaintiff, Greelyville, S. C.; and defendant's receipt to the plaintiff, consignee, at Greelyville, S. C., for freight charges on five of said boxes, and acknowledging shortage of one box (for loss of which the suit was brought), showed that the loss occurred while the goods were in defendant's possession.

The judgment of the circuit court is affirmed.

TARR V. OREGON SHORT LINE R. CO.

(Supreme Court of Idaho, Jan. 31, 1908.)

[93 Pac. Rep. 956.]

Carriers—Carriage of Passengers—Passengers' Effects—Checks—Right to—Statutory Provisions.—Under the provisions of section 2674, Rev. St. 1887, a railroad corporation doing business in this state is required to affix a check to every parcel of baggage received by it, and to deliver a duplicate thereof to the passenger or person delivering the same, and, if such check is refused on demand therefor, the railroad company is liable in the sum of \$20 to such person, and, in addition thereto, cannot collect any fare or toll from such passenger.

Same.—Where a railroad company has no night agent at a station to receive and check baggage, but stops its train at such station, and takes on a passenger and his baggage, and after the passenger boards the train and demands a check for his baggage, and declines to pay his fare or deliver up his ticket until he receives such check, and the employees of the company in charge of the train neglect and refuse to deliver a baggage check, and, on the contrary, eject the passenger from the train, the railroad company will be held liable in damages for the tort so committed.

Same.—Where a passenger purchases a ticket, and on the arrival of the train at the station points out to the conductor and brake-

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man his baggage, and they receive the same and take it on board the train, and the passenger boards the same train for the purposes of transportation to another station on the line of the company's road, and demands of the conductor on the train a baggage check, he is entitled to receive such check before delivering up his ticket or paying his fare, and, on failure to receive such baggage check and refusal to pay his fare until he does receive it, he does not thereby become a trespasser on such train, and the employees of the company have no right to eject him from the train until they have either delivered to him his baggage check, or until he has reached the station to which he notified the employees receiving the baggage that he desired the same checked.

Same.—Under the provisions of section 2674, Rev. St. 1887, the liability to furnish the passenger free transportation to the point of his destination in case of refusal to deliver him a check for his baggage is as much a part of the penalty for refusal to check the baggage as is the \$20 cash penalty named therein.

Constitutional Law—Due Process of Law—Regulation of Carriers.*—The requirements of section 2674, Rev. St. 1887, that a railroad company shall not collect toll or fare from a passenger when it fails, neglects, or refuses to deliver the passenger a check for his baggage, is valid and binding upon such company as a part of the penalty for its failure and neglect to comply with the statute, and is in no sense a taking of property without due process of law within the inhibition of the fourteenth amendment to the Constitution of the United States.

Trial—Instructions—Conformity to Pleading and Proof.—The instruction "that every particular phase of the injury may enter into the consideration of the jury in estimating compensation, loss of time with reference to the injured party's condition and ability to earn money, his loss from permanent impairment of faculties, mental and physical pain, suffering and disfigurement, are all elements to be considered by the jury in estimating plaintiff's damages," while correct as a general principle of law, is erroneous in a case where there is no allegation of loss of time, and no evidence has been introduced showing the loss of any particular or specified time or the value thereof or amount of damage sustained by reason of loss of time.

Appeal—Harmless Error—Instructions.—Where the court has instructed the jury that they must be governed by the evidence in assessing damages; and that they must find the data therefor within the evidence, and the entire record in the case discloses that no claim has been made for damages on account of loss of time, and no evidence has been introduced thereon, and it is reasonably clear from the record that the jury did not consider such element in assessing damages, an erroneous instruction to the effect

*See preceding case, and foot-note.

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that loss of time is a proper element to be considered in such cases is not within itself such error as will cause a reversal of the judgment.

Damages—Pain and Humiliation—Necessity of Evidence of.—

It is unnecessary to submit any evidence as to a proper and just compensation to be awarded for wounded feelings and physical and mental pain and suffering and humiliation, but the compensation to be allowed therefor is a matter addressed to the judgment and good sense of the jury, and to be determined by them in view of all the evidence submitted in the case as to the wrongs and injuries inflicted.

Trial—Instructions—Constructions as a Whole.—All the instructions given in a case must be read and considered together as a whole, and where they are not inconsistent, but may be reasonably and fairly harmonized, it will be assumed that the jury gave due consideration to the instructions as a whole rather than to an isolated portion thereof.

(Syllabus by the Court.)

Appeal from District Court, Bingham County; J. M. Stevens, Judge.

Action by Jacob E. Tarr against the Oregon Short Line Railroad Company. From a judgment for plaintiff and an order denying a new trial, defendant appeals. Affirmed.

P. L. Williams and *D. Worth Clark*, for appellant.

G. F. Hansbrough, for respondent.

AILSHIE, C. J. This is an appeal from the judgment and order denying a motion for a new trial. The appellant recovered judgment in the lower court against the defendant for the sum of \$1,000 damages on account of the agents and employees of the defendant company wrongfully and unlawfully ejecting him from one of its railway trains. The respondent, Jacob E. Tarr, was on the 23d day of December, 1905, residing with his family at Shelley, Idaho, and on the evening of that day purchased from the ticket agent at that place three tickets to Pocatello. It seems that the railway company had no night agent at Shelley, and that it was the practice of the company to take on baggage without the same being checked on the passenger's pointing out his baggage to the conductor or brakeman or other employee of the company. About 2 o'clock on the morning of the 24th the south-bound passenger arrived at the station, where respondent, together with his wife and daughter, was waiting to board the train. When the train stopped, the respondent pointed out to the conductor and brakeman a trunk and roll of bedding he had on the platform, and told them that he wanted to take that baggage with him to Pocatello. When the respondent asked them

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to put the baggage on board, they made some profane remarks concerning it, but put the trunk on the baggage car, and left the roll of bedding. No question is raised here concerning the roll of bedding that was left on the platform. Respondent helped his wife and daughter on the train. After the train pulled out, the conductor came through taking up tickets and collecting fare, and, when he came to respondent, the respondent gave him one ticket and told him that he had a trunk on board, for which he wanted a baggage check. He also told the conductor that, when he got his check for his trunk, he would give him the other two tickets. The conductor insisted on his surrendering up the tickets, but the respondent declined to do so. This demand for the tickets was made two or three times; the conductor telling him that, if he did not surrender them, he would put him off the train. Finally, when the train was about a mile out of the station of Blackfoot, the conductor came to respondent and told him, if he did not surrender the tickets, he was going to put him off. Respondent replied that he would not do so unless the conductor gave him a check for his trunk. Thereupon the conductor called the brakeman, and the two of them proceeded to eject the respondent from the train. Before they had completely ejected him, he told the conductor that he would not give up the tickets, but that, if he would let him ride to Pocatello, he would pay the fare in cash. They disregarded this offer, however, and put him off the train. It seems to be generally agreed by all the witnesses that the train did not fully stop, but "slowed up," as the witnesses put it. As the last coach passed respondent swung on to the platform, and, as he did so, he encountered the brakeman, who kicked him off, and in his endeavor to do so injured and bruised respondent's hands and dislocated a thumb. When he was kicked off the train, he was either struck by the brakeman one blow on the back over the lungs and another over the kidneys, which made bad bruises, or else he received those injuries when he fell from the moving train. Respondent was under the care of a physician for a couple of weeks, and the physician testified that he had a bad bruise over his lung and also over his kidneys, and that he had incipient pneumonia, which might have been caused by the blow over the lungs.

The respondent contends that under the provisions of section 2674 of the Revised Statutes of 1887 he was entitled to demand and receive a check for his baggage before surrendering his transportation, and that he was entitled to remain on appellant's train until such time as he received a check for his baggage, or until he reached his destination. Appellant, on the other hand, contends that, while the company would have been liable for the penalty prescribed in section 2674 for failing and neglecting to furnish the baggage check, notwithstanding that, respondent was

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not entitled to ride on the train without paying his fare or surrendering up his ticket. Section 2674 provides as follows: "A check must be affixed to every package or parcel of baggage when taken for transportation by any agent or employee of a railroad corporation, and a duplicate thereof given to the passenger or person delivering the same in his behalf; and if such check is refused on demand, the railroad corporation must pay to such passenger the sum of twenty dollars to be recovered in an action for damages; and no fare or toll must be collected or received from such passenger, and if such passenger has paid his fare the same must be returned by the conductor in charge of the train; and on producing the check, if his baggage is not delivered to him by the agent or employee of the railroad corporation, he may recover the value thereof from the corporation." It will be seen from the foregoing provision of the statute that it is made the duty of the railway corporation to affix a check to every parcel of baggage and deliver a duplicate thereof to the owner. In this case the company, having no night agent at the station, received baggage on its being pointed out by the passenger, and was in the habit of attaching a check on the train, and delivering the duplicate to the passenger. Our decision on this point turns upon the question as to whether the railway company had a right to demand the fare from respondent as a condition precedent to furnishing him with a check for his baggage. Was defendant justified in ejecting him from the train upon his refusal to surrender up his ticket or pay his fare? There can be no question but that he rightfully boarded the train. He had bought his ticket, had caused his baggage to be placed upon the train, and he had a lawful right to board appellant's railway train. The question is, then: Did he, after entering the car, do any act that converted him into a trespasser? The primary duty devolving upon the passenger is to pay his fare, and on the railway company to carry the passenger. In addition to carrying the passenger, the company agrees to carry a certain amount of baggage with each passenger. In this case the company received the respondent's baggage, and, under the provisions of the statute above quoted, was clearly liable to check the same and furnish a duplicate to the passenger. A failure to do so subjected the company to a certain penalty: First, to pay the sum of \$20 as damages for the neglect and failure; and, in addition thereto, defendant was prohibited from collecting or receiving any "fare or toll" from the passenger. Clearly, then, the passenger's transportation is made as much a part of the penalty as is the \$20. Upon failure to furnish the passenger with his baggage check, it was not only liable to pay a \$20 penalty, but it was also liable to carry the passenger free of "fare or toll" until such time as it should furnish such check or until

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he reached his destination—the point to which he had requested a check for his baggage. We do not think this statute is capable of any other reasonable construction. We therefore conclude that the respondent was rightfully upon the appellant's railway train, and his ejection by the company's agents and employees was wrongful and unlawful, and in violation of his rights. If it was unlawful for them to eject him, it was unlawful for them to keep him off the train. If he was rightfully on the train, and they put him off, he had a clear right to return to the train, and their using force and violence in keeping him off was as much of a wrong and trespass upon his rights as it would have been for them to have used that violence on him in the first instance. This case, it must be remembered, involves transportation exclusively within the confines of this state, and is purely a domestic transaction.

Counsel for appellant have argued that the company in the discharge of its duty has a right to establish certain rules and regulations to facilitate business, and that, among other things, it was the duty of the passenger to pay his fare or surrender his ticket before demanding his baggage checked. The law does not say which act shall be performed first, but they are clearly concurrent duties; one resting upon the passenger and the other upon the transportation company. The passenger had an undoubted right to demand his baggage check. The company's agent in this case did not give him any assurance that they would ever furnish him a check for his baggage. The only assurance he ever had was that the conductor said to him: "You give me your tickets, and, if your baggage is lost, I think we can locate it for you later." This was far from an assurance that the conductor would discharge his duty under the statute and secure the passenger a check for his baggage before reaching his destination. We think the doctrine is correct as stated by 2 Hutchinson on Carriers (3d Ed.) § 1036, cited by appellant, to the effect that passengers are required to show their tickets to the conductor at reasonable times and be subject to the reasonable requirements of the company. In this case the company had already received the passenger's baggage on its train, and had complete charge and control thereof, and the conductor had received from the passenger one ticket, and knew that he had two other tickets in his possession on the same train. A somewhat different rule would apply, we apprehend, where a prospective passenger takes his baggage to the depot, and demands that it be checked. In such case he would have to produce a ticket, and, if required, deliver it to the agent for the purpose of being punched.

Counsel for appellant insist that the statute (section 2674, *supra*) should not receive the construction we are placing on it,

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for the reason that such a construction would be in violation of the fourteenth amendment to the Constitution of the United States, in that it would deprive the railroad company of property without due process of law. Counsel admit that the company would be liable for the \$20 penalty under the statute on a failure to furnish the passenger with a baggage check, but say it would be taking its property without due process of law to allow a passenger to ride without paying his fare. Such an argument is unsound, for the reason that free transportation under the condition named in the statute is no more a taking of property without due process of law than the collection of the \$20 penalty. Indeed, we think one is as much a part of the penalty as the other. In the matter of transportation the statute says the company shall not collect fare unless the check is furnished. As to the payment of the \$20 penalty, the company might do that without action, or, if it fails to do so, it is liable to an action for the recovery of the same. In this case, however, the company refused to carry the passenger as required to do by section 2674, and proceeded to eject him from the train. In doing so, it committed a tort for which it is liable in this action. This, it should be observed, is not an action for breach of the contract, but an action in tort to recover for the wrongs committed. The passenger is not endeavoring to collect the \$20 penalty prescribed by the statute, but insists that he was rightfully on the appellant's train, and that he had a right to remain there until he reached his destination, and that, under such circumstances, the employees of the railroad company committed a tort for which this action has been prosecuted. This case is not parallel with, or subject to, the same rule that governs cases where a passenger goes upon a railway train, and refuses to pay fare or surrender his ticket until he is furnished a seat. In those cases it is held that, if he remains on the train, he must pay his fare, but that, on the other hand, he may leave the train at the first opportunity and sue for a breach of the contract and recover his damages. *Memphis, etc., R. R. Co. v. Benson*, 85 Tenn. 627, 4 S. W. 5, 4 Am. St. Rep. 776; *Pittsburg R. R. Co. v. Van Houten*, 48 Ind. 90; *St. Louis, etc., R. R. v. Leigh*, 45 Ark. 368, 55 Am. Rep. 558; *Davis v. Kansas City, etc., R. R. Co.*, 53 Mo. 317, 14 Am. Rep. 457.

On the trial of this case, defendant's counsel objected to the introduction of evidence showing that the passenger, when being ejected from the train, offered to pay his fare if the employees of the company would permit him to continue on his journey. If it be conceded that it is a correct principle of law that a passenger after refusing to surrender his ticket or pay fare, and the employees of the company have commenced to eject him, cannot then offer to pay fare and reinstate himself in the right to

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continue on the train, then, of course, such evidence as was offered in this case would be immaterial and was improperly admitted. When it came to giving the instructions, however, to the jury, the court adopted the appellant's theory of the law, and gave an instruction on its request, to the effect that a "passenger who refuses to pay his fare or furnish and deliver up a ticket good for such transportation, and on account of such refusal the train is stopped for the purpose of ejecting him, he cannot then by a tender of his fare, or an offer to deliver up his ticket, reimpose upon the carrier the duty of carrying him." In the case at bar this question became entirely immaterial, and evidently did not enter into the consideration of the jury in making up their verdict for the reason that the passenger was rightfully on the train, and the company had no right to eject him in the first instance.

The next and most serious question that arises on this appeal is directed against the instructions given by the court to the jury. The objectionable instruction is plaintiff's request No. 3, which is as follows: "The jury is instructed that every particular phase of the injury may enter into the consideration of the jury in estimating compensation, loss of time with reference to the injured party's condition, and ability to earn money in business or calling. His loss from permanent impairment of faculties, mental and physical pain, suffering and disfigurement, are all elements to be considered by the jury in estimating plaintiff's damage, if you find from the evidence that plaintiff is entitled to recover." The causes and injuries for which plaintiff demanded damages in his complaint are in substance as follows: "A bad bruise on the back over the left lung; a bad bruise over the left kidney; his right hand badly bruised and sprained, and two bruises on both legs and hands, and by reason of the insult, humiliation, and the bodily and mental suffering of the plaintiff, caused by the said unlawful acts of the defendant in forcibly, violently, and unlawfully assaulting, bruising, and ejecting the plaintiff from its said train of cars." Damages were claimed for these injuries in the sum of \$1,975. On the trial no evidence whatever was introduced showing any particular or specific loss of time nor the value of any time lost, nor was there any evidence introduced showing the amount paid out for medical attention or for any other item of loss, damage, or injury, and no evidence whatever was given placing an estimate as to a just compensation for the injuries sustained. The court also instructed the jury that for mental and physical injury and suffering and for humiliation and wounding a man's feelings the measure of damages was a question entirely for the jury to determine as nearly as possible from the evidence in the case. The court also instructed the jury that they must be governed

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by the evidence, and that, if they should find for the plaintiff, they could only assess such damages as they found him entitled to from the evidence.

Defendant's requested instruction No. 11 was given by the court, and that instruction also advised the jury that, if they found in favor of the plaintiff, the only damage they could assess was such as was within the evidence and justified thereby, and that they must secure their data from the evidence itself upon which they calculated and assessed the damages. It must be conceded in the outset that the plaintiff's requested instruction No. 3, as given by the court, while entirely correct as a general principle of law, was improper and erroneous in this particular case, for the reason that no claim appears to have been made on account of loss of time, and that no evidence was given showing the loss of any particular or specific amount of time or the value thereof. It is well settled that, as to mental and physical pain and suffering and humiliation, it is unnecessary to submit any evidence as to the value thereof and the amount of damages to compensate therefor, but that the same is a question entirely and exclusively for the jury. *North Chicago St. Ry. Co. v. Fitzgibbons*, 180 Ill. 466, 54 N. E. 483; *Springfield Consol. Ry. Co. v. Hoeffner*, 175 Ill. 642, 51 N. E. 885; *Sutherland on Damages* (3d Ed.) § 1243; *Hughes' Instructions to Juries*, §§ 652, 653. On the other hand, it is equally well settled that, where the party claims special damages for loss of time, he must prove both the amount of time lost and the value thereof, and that the jury must be governed by the evidence in relation thereto. *Western Union Tel. Co. v. Morris*, 83 Fed. 992, 28 C. C. A. 56; *Platt v. City of Ottumwa* (Iowa), 113 N. W. 831; *Barron v. N. P. Ry. Co.* (N. D.), 113 N. W. 102; *Gardner v. B., C. R. & N. R. Co.*, 68 Iowa, 588, 27 N. W. 768; *So. Ry. Co. v. Hawkins*, 89 S. W. 258, 28 Ky. Law Rep. 364.

It will be seen, however, on an examination of the authorities, that, where a case has been reversed on account of such an instruction, it has been where there was either evidence of loss of time and no evidence of its value, or where the court had told the jury that they might assess the damages for loss of time without any evidence as to its value or without reference to such evidence if any had been given. The latter condition is peculiarly noticeable and prominent in *Platt v. City of Ottumwa*, *supra*. In the case at bar there is no evidence of any particular or specific loss of time, and the most that could be said in that regard would be that it contained a mere inference of the loss of some period of time less than two weeks while respondent was receiving medical treatment, and no evidence whatever as to the value of any time lost. The record is convincing from the complaint to the last word of evidence and instruction in

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the case that the real cause for which the plaintiff was seeking to recover damages, and against which the defendant was waging its defense, was the physical and mental suffering, pain, and humiliation as the direct and immediate result of the wrongful acts of the railway company in ejecting plaintiff from its train. The record nowhere contains any suggestion or intimation that the jury was asked to give the plaintiff any special damages on account of loss of time. The question, then, arises whether the error committed in giving plaintiff's instruction No. 3 was, under the facts and circumstances of this case, and in view of the evidence produced, and of the other instructions given, such an error as prejudiced any substantial right of the defendant for which this court would be justified in reversing the judgment under the purview of section 4231, Rev. St. 1887. In the first place, we must assume that the jury were reasonable and fair-minded men and limited their finding as to the plaintiff's damages to that shown by the evidence in the case as they were instructed by the court. In the second place, there is nothing in the record that indicates that the jury were acting under any sense of passion, prejudice, or bias. The evidence is abundant to justify the verdict without taking into consideration any loss of time whatever, or any other element of damages, except that of physical and mental pain and suffering, and the humiliation consequent upon plaintiff's unlawful ejection from the train. Indeed, we think the appellant company were under the facts and circumstances of this case exceedingly fortunate in reducing plaintiff's demand to the sum allowed by the jury. In the third place, there is nothing in the record that suggests or intimates that the jury took into consideration loss of time in estimating damages or any other matter than that entirely proper for their consideration.

Lastly, instruction No. 3 is a correct general principle of law, and, although there was no allegation in the complaint and no evidence in the case claiming damage for the one element, namely, loss of time mentioned in this instruction, we think it would be farfetched and illogical for an appellate court to hold that under such facts and circumstances the judgment should be reversed, and thereby assume that the jury went outside of the pleadings and proofs under such an instruction as this in order to render an unjust verdict against the defendant. There is no doubt but that the court should not give an instruction on a question of law that is not involved in the pleadings or proofs, but we are equally satisfied in this case that the appellant has not been prejudiced or injured or damaged on account of the instruction, and we are unwilling to reverse the judgment for that reason. Again, we have repeatedly held that all the instructions given in a case must be read and considered together as a whole,

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and that, where they are not inconsistent but may be reasonably and fairly harmonized, it will be assumed that the jury gave due consideration to the whole instruction rather than to an isolated portion thereof. *Lufkins v. Collins*, 2 Hasb. (Idaho) 256, 10 Pac. 300; *State v. Corcoran*, 7 Idaho, 220, 61 Pac. 1034; *Hansen v. Haley*, 11 Idaho, 293, 81 Pac. 935; *State v. Bond*, 12 Idaho, 424, 86 Pac. 43; *State v. Niel* (Idaho), 90 Pac. 860.

The other instructions given by the court we think correctly stated the law, and the assignments of error in reference thereto are without merit. All of the defendant's requested instructions that correctly stated the law were given, either literally or in substance by the court. Those rejected were clearly erroneous, and properly refused by the court. We think the judgment in this case is a just one, and that no sufficient grounds have been shown why it should be reversed.

Judgment is affirmed, with costs in favor of respondent.

SULLIVAN and STEWART, JJ., concur.

STATE v. NORTHERN PAC. RY. CO.

(Supreme Court of Montana, Feb. 25, 1908.)

[93 Pac. Rep. 945.]

Commerce—Subjects of Regulation—Railroads.*—Act Feb. 5, 1907 (Laws 1907, p. 6, c. 5), providing that those employed in running or operating locomotive engines or railroad trains in this state shall not be required to work more than a certain number of hours without rest, and prescribing penalties for its violation, is not unconstitutional as being a regulation of interstate commerce, in the absence of federal legislation on the subject.

States—Repeal—Implied Repeal by Act Relating to Same Subject—Retroactive Operation.—Act Feb. 5, 1907 (Laws 1907, p. 6, c. 5), regulating the time a railroad may require its employees

*For the authorities in this series on the subject of state interference with interstate commerce, see foot-notes appended to *Atlantic Coast Line Ry. Co. v. Commonwealth* (Va.), 11 R. R. R. 399, 34 Am. & Eng. R. Cas., N. S., 399, where all the preceding ones are collected; foot-notes appended to *State v. Cumberland & P. R. Co.* (Md.), 25 R. R. R. 122, 48 Am. & Eng. R. Cas., N. S., 122; foot-note appended to *Skipper v. Seaboard Air Line Ry.* (S. Car.), 24 R. R. R. 306, 47 Am. & Eng. R. Cas., N. S., 306; foot-note appended to *McNeill v. Southern Ry. Co.* (U. S.), 24 R. R. R. 285, 47 Am. & Eng. R. Cas., N. S., 285; *State v. Thompson* (Ore.), 24 R. R. R. 150, 47 Am. & Eng. R. Cas., N. S., 150; *Houston, etc., R. Co. v. Mayes* (U. S.), 24 R. R. R. 50, 47 Am. & Eng. R. Cas., N. S., 50; *Harrill Bros. v. Southern Ry.* (N. Car.), 23 R. R. R. 427, 46 Am. & Eng. R. Cas., N. S., 427.

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to work, is not made ineffective by the passage of Act March 4, 1907, c. 2939, 34 Stat. 1415 [U. S. Comp. St. Supp. 1907, p. 913], similar in substance, but not to become operative till March 4, 1908, since legislation is not effective for any purpose until it becomes operative.

Appeal from District Court, Lewis and Clark County; J. M. Clements, Judge.

Action by the state of Montana against the Northern Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Wm. Wallace, Jr., John G. Brown, and R. F. Gaines, for appellant.

Albert J. Galen, Atty. Gen., E. M. Hall, Ass't Atty. Gen., for the State.

BRANTLY, C. J. The defendant is a corporation, organized under the laws of the state of Wisconsin, and is engaged in operating a line of railroad from a point on the shore of Lake Superior, through Montana and other states, to a point on the shore of Puget Sound. In the conduct of its business as a common carrier it transports passengers and freight from points without to points within the state of Montana, from point to point within the state, and from points within to points without the state. On January 9, 1908, the Attorney General filed an information in the district court of Lewis and Clark county, charging, in substance, that on or about December 30, 1907, the defendant, while engaged in the transportation of freight in the usual course of its business in said county, did willfully, intentionally, and unlawfully permit and require certain of its employees, being its engine and train crews in charge of one of its freight trains, to labor in the operation thereof for more than 16 consecutive hours, to wit, for 23 consecutive hours, there being no particular occasion by reason of accident, storm, wreck, washout, unavoidable delay, or other like cause, permitting or requiring said employees to so labor. The charge was preferred under the provisions of the act of the Tenth legislative assembly, approved February 5, 1907 (Laws 1907, p. 6, c. 5) entitled, "An act to regulate the hours of labor of locomotive engineers, locomotive firemen, conductors, trainmen, operators and agents acting as operators, and to provide penalties and civil liabilities for the violation thereof." To the information the defendant interposed a general demurrer. This having been disallowed, it entered its plea of not guilty. At the trial counsel submitted an agreed statement of facts, embodying substantially the allegations in the information. The defendant was found guilty, and was sentenced to pay a fine. It has appealed from the judgment and an order denying it a new trial.

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It is not questioned that the information is sufficient, in form and substance, to state an offense, if the statute is a valid exercise of legislative power. The contention is that the judgment cannot be sustained because the legislation is invalid, in that (1) it is an attempt to regulate interstate commerce, the power to do which is vested by the federal Constitution, exclusively in the Congress of the United States; and (2), even though it was a valid exercise of power at the time of its enactment, it became invalid and inoperative upon the passage of the act of Congress, approved March 4, 1907, dealing with the same subject. 34 Stat. 1415, c. 2939 [U. S. Comp. St. Supp. 1907, p. 913]. Section 1 of the act declares: "On all lines of steam railroads or railways operated in whole or in part within this state the time of labor of locomotive engineers, locomotive firemen, conductors, trainmen, operators and agents acting as operators, employed in running or operating the locomotive engines or trains on or over such railroads or railways in this state, shall not at any time exceed sixteen (16) consecutive hours or to be on duty for more than sixteen (16) hours in the aggregate in any twenty-four (24) hour period. At least eight (8) hours shall be allowed them off duty before said engineers, firemen, conductors, trainmen, operators and agents acting as operators, are again ordered or required to go on duty; provided, however, that nothing in this section shall be construed to allow any engineer, fireman, conductor or trainman to desert his locomotive or train in case of accident, storms, wrecks, washouts, snow blockade or any unavoidable delay arising from like causes, or to allow said engineer, fireman, conductor or trainman to tie up any passenger or mail train between terminals." Section 2 prescribes penalties and imposes civil liabilities for violations of these provisions. Section 4 (page 7) repeals conflicting legislation, and section 5 declares the act immediately operative.

1. Upon the first proposition the argument is that the grant of power to Congress under the federal Constitution "to regulate commerce * * * among the several states * * *" is exclusive; and since the defendant is, and at the time the alleged offense was committed was, engaged in interstate commerce, and the act in question assumes to impose burdens and restrictions upon it in the transaction of its business in this connection, as well as upon that done exclusively between points within the state, the act is the result of an unwarranted assumption of power by the Legislature. The purpose of the Legislature in the enactment of this statute was to secure better service at the hands of all persons operating lines of railroad within or through this state, and at the same time to promote the safety of the lives and property entrusted to them. It is apparent to every one that a continuance beyond a reasonable time each day in the performance

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of the exacting duties incident to an employment that is always attended with danger tends to impair both the health and efficiency of employees, and should not be permitted except in cases of necessity. The Legislature was seeking, then, by an exercise of the police power of the state, not only to serve the general welfare of the public, but also to preserve the lives and health of all persons employed in, or having direct connection with, the running of trains. Now, the police power is inherent in the several states. It remains with them notwithstanding the grant of power by them to the federal government, and may be exercised by their several Legislatures upon all matters coming within its purview, without limitation or restriction. *Lake Shore & Michigan Southern Ry. Co. v. Ohio*, 173 U. S. 285, 19 Sup. Ct. 465, 43 L. Ed. 702; *Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166; 22 Am. & Eng. Ency. Law (2d Ed.) 919. When, however, the state undertakes to legislate upon the general subject of commerce, the distinction between what is local and what is national in character must be kept in mind.

In *Covington, etc., Bridge Co. v. Kentucky*, 154 U. S. 209, 14 Sup. Ct. 1087, 38 L. Ed. 962, the Supreme Court of the United States distinguishes the subject of legislation in this connection into three classes: (1) Those over which the power of the state is exclusive; (2) those in which the state may act in the absence of legislation by Congress; and (3) those over which the power of Congress is exclusive, and the state cannot interfere at all. It is pointed out that in the first class fall many subjects of legislation which may affect interstate commerce indirectly, but their bearing upon it is of a local character so remote that they cannot be deemed in any just sense an interference. In the second class are embraced laws for the regulation of pilots employed upon navigable rivers over which the federal government has jurisdiction; quarantine and inspection laws and the policing of harbors; the improvement of navigable channels; the regulation of wharfs, piers, and docks; the construction of dams and bridges across navigable streams and the establishment of ferries. Citing and quoting with approval from the decision in *Colley v. Philadelphia Port Wardens*, 53 U. S. 299, 13 L. Ed. 996, the conclusion is announced that on all these subjects the states are free to legislate, so long as the effect is to control matters local in character only, until Congress chooses to act, though such legislation indirectly affects commerce with foreign nations and between the states. In the third class fall all those subjects of legislation which are not local in their nature, and do not affect interstate commerce incidentally only, but are national in their character. Over all such subjects Congress has exclusive power, and, in so far as it refrains from acting upon them, it indicates its will that in these respects commerce shall be free

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from regulation. In the case of *Cooley v. Philadelphia Port Wardens*, one of the questions decided was whether an act of the Legislature of Pennsylvania, regulating pilots and pilotage, was repugnant to the commerce clause of the Constitution. It was held that, though Congress had the power to deal with the subject, the mere grant of the power did not amount to a denial of it to the state, and hence that the act was valid until it should be superseded by an act of Congress. Statutes like the one before us have often been drawn in question before the courts, and they have invariably been held valid by the highest court of last resort, except when they were clearly unreasonable interferences with interstate commerce. Cases holding such laws valid are collected by Mr. Justice Brown, in *Cleveland, C., C. & St. L. Ry. Co. v. People of the State of Illinois*, 177 U. S. 514, 20 Sup. Ct. 722, 44 L. Ed. 868, who makes the following summary: "We have recently applied this doctrine to state laws requiring locomotive engineers to be examined and licensed by the state authorities (*Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 503); requiring such engineers to be examined from time to time with respect to their ability to distinguish colors (*Nashville, etc., Railway v. Alabama*, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352); requiring telegraph companies to receive dispatches and to transmit and deliver them with due diligence, as applied to messages from outside the state (*Western Union Tel. Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105); forbidding the running of freight trains on Sunday (*Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166); requiring railway companies to fix their rates annually for the transportation of passengers and freight, and also requiring them to post a printed copy of such rates at all their stations (*Railway Company v. Fuller*, 17 Wall. 560; 21 L. Ed. 710); forbidding the consolidation of parallel or competing lines of railway (*Louisville & Nashville Railroad v. Kentucky*, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849); regulating the heating of passenger cars, and directing guards and guard posts to be placed on railroad bridges and trestles and the approaches thereto (*N. Y., N. H., etc., Railroad Company v. New York*, 165 U. S. 628, 17 Sup. Ct. 418, 41 L. Ed. 853); providing that no contract shall exempt any railroad corporation from the liability of a common carrier or a carrier of passengers which would have existed if no contract had been made (*Chicago, Milwaukee, etc., Railway v. Solan*, 169 U. S. 133, 18 Sup. Ct. 289, 42 L. Ed. 688); and declaring that, when a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless at the time of such acceptance

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such carrier be released or exempted from such liability by contract in writing, signed by the owner or his agent (*Richmond & Allegheny Railroad v. Patterson Tobacco Co.*, 169 U. S. 311, 18 Sup. Ct. 335, 42 L. Ed. 759). In none of these cases was it thought that the regulations were unreasonable, or operated in any just sense as a restriction upon interstate commerce." In the Illinois case, a statute requiring railway companies to stop all trains at all county seats was held to be direct interference with interstate commerce, and therefore unconstitutional, but the Ohio case (*Lake Shore & Michigan Southern Ry. Co. v. Ohio*, *supra*) is distinguished and the result approved. Among the numerous decisions by this court some are found which seem to be out of line with others, but generally the rule has been observed that upon all such subjects, if Congress has not acted, the states are free to legislate, so long as they seek to promote the public safety and convenience, and do not undertake to hamper unnecessarily or substantially control the agencies of interstate commerce in the conduct of their business. In *Lake Shore v. Michigan Southern Ry. Co. v. Ohio*, *supra*, a statute of Ohio requiring each railway company to stop three of its trains, going each way, daily except Sunday, at all stations, cities, or villages containing over three thousand inhabitants, to receive and set off passengers, was upheld on the ground that it was a proper exercise of police power by the state, and, though the decision was by a divided court, the doctrine of the cases cited by Mr. Justice Brown, in *Cleveland, C., C. & St. L. Ry. Co. v. People of Illinois*, was approved. In this connection the case of *Hennington v. Georgia* is also in point, though it is disapproved by the dissenting justices in the Ohio case.

On principle we cannot distinguish between the effect of a statute such as that of the state of Alabama, which was considered in *Smith v. Alabama*, 124 U. S. 472, 8 Sup. Ct. 564, 31 L. Ed. 512, and the one here involved. In that case, in order to secure the maximum of efficiency in railroad engineers, they were required to submit themselves to an examination to test their mechanical skill and knowledge, and to be licensed by a competent board of examiners, before they could be employed by any railway company. An additional requirement was that they must be men of careful and temperate habits. The statute in question applied generally to the business of railroads, without making any distinction between that which was strictly interstate commerce, and that which was commerce within the state exclusively. So in *Nashville, C. & St. L. Ry. Co. v. Alabama*, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352, and for the same reason, all employees having charge of or directly connected with the operation of trains were required to submit themselves from time to time to examination to test their ability to distinguish

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color signals, and to obtain a license certifying to their efficiency in this regard, before they could enter or continue in the service of any railroad operating in the state. The mechanical efficiency or personal habits of engineers, or their capacity or that of other railway employees to distinguish colors, and hence their greater efficiency in the business of handling trains, does not more nearly concern the public safety than does the necessity for sleep and rest, in order that they may have full possession of their mental powers and physical strength to aid them in the performance of their responsible duties. Nor does the requirement in the one case more seriously interfere with or restrain commerce than in the other. In all such cases an additional burden is imposed upon the railroad corporation, and to the extent of this additional burden there is an interference with the conduct of its business. The cases cited, it seems to us, are conclusive; and, while we think it properly conceded that the subject, so far as it affects interstate commerce, falls within the power of federal legislation under the Constitution, yet, in the absence of such legislation on the subject, it is a matter for state control, under the exercise of its police power, to provide for the public safety and also for the health and lives of railroad employees themselves.

2. It remains to inquire whether the law is still operative, notwithstanding the act of Congress, referred to above, deals with the same subject. The state statute became a law on February 5, 1907. The federal statute does not by its own terms become operative until March 4, 1908. This being the situation, did it upon its approval invalidate the state statute, on the theory that it is a direct utterance of Congress under its constitutional power upon the same subject? The two acts embody substantially the same provisions, and it is clear that it was the intention of Congress to assume control of the subject, so far as it concerns companies engaged in interstate commerce. Counsel for appellant cite no authority in support of their contention, nor do we know of any directly in point. It seems to us, however, that in the absence of some declaration on the subject in the act itself, indicating the intention to supersede at once existing state legislation, there is no foundation in reason for the assertion that an act, to take effect in the future, has that effect. In *Smith v. Alabama*, *supra*, it is said: "But for the provisions on the subject found in the local law of each state, there would be no legal obligation on the part of the carrier, whether ex contractu or ex delicto, to those who employed him, or, if the local law is held not to apply where the carrier is engaged in foreign or interstate commerce, then, in the absence of laws passed by Congress or presumed to be adopted by it, there can be no rule of decision based upon rights and duties supposed to grow out of the relation of such carriers to the public or to individuals. In other

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words, if the law of the particular state does not govern that relation, and prescribe the rights and duties which it implies, then there is and can be no law that does until Congress expressly supplies it, or is held by implication to have supplied it, in cases within its jurisdiction over foreign and interstate commerce. The failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the state law, which until displaced covers the subject." While the above quotation is not directly in point, it seems to lend support to the notion that, until legislation by Congress upon any subject upon which the state has concurrent jurisdiction becomes operative, the existing state legislation is not displaced, but in the interim remains in full force, especially so in the absence of any declaration by Congress on that subject. The case of *Sherlock v. Alling*, 93 U. S. 99, 23 L. Ed. 819, seems also to support this conclusion. We do not see how an act which does not by its own terms become a rule of conduct until a future time can be said to displace another existing rule on the same subject during the interval between the time of its enactment and the time it becomes operative, even though the existing rule be inconsistent with it, in the absence of some express or implied declaration of a purpose that such shall be the result. Legislation is not effective for any purpose until it becomes operative. In a given case the effective operation of a statute requiring expensive preparation, or a change in the mode of conducting business on the part of those whom it is intended to affect, may very properly be deferred to future time. So far as it provides for such adjustment and changes, it may be said to have a quasi operative effect; but even in such cases the existing law must be regarded as remaining in force until it is actually displaced by the new one. The act of Congress contains no such declaration, and we hold that the state statute, which was valid and in force at the time of its passage, remains in force until the act of Congress becomes effective.

We are of the opinion that there is no merit in either of the contentions made by the appellant. Consequently that the judgment and order denying a new trial must be affirmed.

Affirmed.

HOLLOWAY and SMITH, JJ., concur.

WINSLOW BROS. & CO. v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina, March 17, 1908.)

[60 S. E. Rep. 709.]

Carriers—Transportation of Live Stock—Injuries—Value—Bill of Lading—Estoppel.*—Where a bill of lading for the transportation of mules stipulated that their agreed value was \$100 each, and that the carrier's liability should not exceed that sum per head in case of loss or injury, the shipper was estopped to claim for any mule a greater value than \$100.

Same—Evidence.—Where a bill of lading for the transportation of mules limited their value to \$100 each, the shipper, in an action for injury to the mules, was not thereby precluded from showing that the actual value of mules injured exceeded that sum, not for the purpose of allowing a greater recovery per head, but to enable the jury to estimate the damage done to each animal within the limit specified.

Same—Extent of Liability—Interest—Damages.—Where a statute regulating common carriers provided that in case of loss or damage to goods not settled within 60 days a carrier should be liable for the amount of such loss and damage, with interest thereon, from the date of the filing of the claim, and that, unless the consignee recover in the action the full amount claimed, no penalty shall be recovered, interest on the amount of the actual loss established is recoverable from the time of filing the claim, whether the amount of the loss be greater or less than the amount claimed, though no penalty can be assessed unless the full amount claimed is recovered.

Trial—Instructions—Matters of Fact.—Where in an action against a carrier for injuries to certain mules, there was no dispute as to the fact that the claim filed was for \$347.50, an instruction that, if the jury should find for plaintiff in that amount, plaintiff was entitled to interest on that sum, or any less sum, from January 31, 1906, to the filing of the claim, but that plaintiff could not recover interest on any greater sum than that specified in the claim as filed, even though plaintiff established greater damages, was not objectionable as a charge in respect to matters of fact.

Commerce—Interstate Commerce—State Regulations.†—Civ. Code 1902, § 1710, in so far as it imposes on a common carrier the duty to trace shipments as a condition of exemption from liability

*See foot-notes appended to *Southern Express Co. v. Stevenson* (Miss.), 23 R. R. R. 547, 46 Am. & Eng. R. Cas., N. S., 547; foot-notes appended to *Broadwood v. Southern Express Co.* (Ala.), 25 R. R. R. 562, 48 Am. & Eng. R. Cas., N. S., 562

†See preceding case, and foot-notes.

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for loss, is not unconstitutional, as a violation of the interstate commerce clause of the federal Constitution.

Same—Penalties.†—Act Feb. 23, 1903 (24 St. at Large, p. 81), imposing a penalty of \$50 to be paid the consignee by a carrier doing business within the state for failure to adjust and pay a claim for loss of freight while in its possession within a specified time, is not unconstitutional as an attempt to regulate interstate commerce.

Same—Connecting Carriers—Agents.‡—Act May 13, 1903 (24 St. at Large, p. 1), making each carrier the agent of its connecting carrier from whom it receives freight, and liable for freight lost, damaged, or destroyed by such connecting carrier, is invalid, as violation of the interstate commerce clause of the federal Constitution.

Carriers—Connecting Carriers—Injury to Animals—Instructions.—In an action for injuries to plaintiff's mules shipped over the line of different connecting carriers, an instruction that if one of the mules sued for was not lost by defendant company, but by some other railroad company, defendant would still be responsible therefor, unless it informed plaintiff within 40 days after filing their claim, when, where, and by which carrier the loss occurred, was erroneous as ignoring the provision of Civ. Code, 1902, § 1710, exonerating the terminal carrier from liability for loss not occurring on its lines, if, after due diligence, it is unable to trace the line on which the loss occurred.

Same—Burden of Proof.‡—Where a bill of lading for transportation of mules limited each carrier's liability to its own line, the burden was on the terminal carrier to show that the loss of one of the mules in question did not occur on its lines.

Same—Information Concerning Loss.—Civ. Code 1902, § 1710, requires adjustment of loss or damage for goods by carriers within 40 days, and on failure to do so, or to trace the freight and inform the party notifying the carrier of the loss, when, where, and by which carrier the freight was lost, damaged, or destroyed within such time, then the carrier is made liable for all loss, damage, or destruction, as if the same had occurred on its lines, provided that, if the initial terminal or delivering road can prove that by the exercise of due diligence it has been unable to tract the line on which the loss occurred, it shall be excused from liability under such section. Held that, where plaintiff received information from the terminal carrier of the death of one of a shipment of mules, which was taken out of

†See preceding case, and foot-notes.

‡For the authorities in this series on the subject of the burden of proving which one of the connecting carriers was guilty of the negligence causing loss of or injury to the freight, see foot-notes appended to *Rolfe v. Lake Shore, etc., Ry. Co.* (Mich.), 25 R. R. R. 609, 48 Am. & Eng. R. Cas., N. S., 609; *Adams Express Co. v. Walker* (Ky.), 24 R. R. R. 145, 47 Am. & Eng. R. Cas., N. S., 145; foot-notes appended to *Norfolk & W. Ry. Co. v. Wilkinson* (Va.), 23 R. R. R. 290, 46 Am. & Eng. R. Cas., N. S., 290.

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the car, within two days after the arrival of the car at destination, and plaintiff's claim demanded damages for loss of mule thrown out of car at Nashville, Tenn., the terminal carrier was entitled to an instruction exonerating it from such loss, if the information given was all that it could give after the exercise of due diligence, though such information was not as specific as required by such section.

Same—Point of Injury—Presumption.—Where, in an action for injuries to mules, there was evidence that the injured mules when delivered to defendant, the terminal carrier, were apparently in good condition, it would be presumed that the injury occurred while the mules were in defendant's possession.

Appeal from Circuit Court, Sumter County; J. C. Klugh, Judge.

Action by Winslow Bros. & Co. against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed on condition.

P. A. Willcox and Mark Reynolds, for appellant.

L. D. Jennings, for respondents.

JONES, J. This suit was brought to recover damages for loss of one mule and injury to three others, aggregating \$422.50, while in transit from Kansas City, Mo., to Sumter, S. C., and for the statutory penalty of \$50 for failure to adjust and pay the claim within 90 days from the filing thereof. Judgment upon verdict was recovered for \$455.40.

We will not consider in detail appellant's 25 exceptions, several of which were withdrawn on the hearing, but will consider the material and controlling questions involved in the appeal.

1. In the bill of lading introduced in evidence by plaintiffs, the parties agreed upon \$100 as the value of each mule, and there was a stipulation that in consideration of a reduction in freight the liability of the carrier or carriers shall not exceed that sum per head in case of loss or injury to said live stock. The claim as filed by plaintiffs with the defendant company was for one mule thrown out of the car at Nashville, Tenn., \$147.50; injury to sorrel mule in hind legs, \$100; injury to black horse mule in hind legs, \$75; injury to black mare mule in one hind leg, \$25—aggregating \$347.50. As to the third item the complaint alleged injury to the extent of \$100, and as to the fourth item injury to the extent of \$75.50. The court allowed plaintiff to offer testimony to show that the value of the mules was \$175, with a view to show the extent of the injury to the damaged mules; and exceptions are taken to this ruling, upon the ground that plaintiffs are estopped by their contract to claim for any mule a greater value than \$100. There is no doubt that plaintiffs are estopped by their contract from claiming a greater sum

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than \$100 per head for loss or injury to their stock (*Johnstone v. Railroad Co.*, 39 S. C. 55, 17 S. E. 512); but the testimony was not admitted for the purpose of allowing a greater recovery per head than such sum, but to enable the jury to properly estimate the damage done to each animal within the limit specified, and to this end it was proper to show the actual value of each animal. The contract merely provides that the liability of the carrier shall not exceed \$100 per head "in case of loss or injury to said live stock," which does not mean that you must start out with \$100 as the actual value of each animal, and then estimate the injury by reference to a percentage of that value; but the inquiry is, how much was the particular animal injured by reference to its actual value when delivered to the carrier, subject to the limitation that recovery shall not exceed the sum stipulated? On the trial the plaintiff withdrew all claims for \$100 for the mule which died, leaving \$375 as the amount for which recovery was sought, and the court instructed the jury that no recovery could be had as damages for a greater sum than \$100 for loss or injury to any mule.

2. The court instructed the jury that, if they should find for plaintiff damages to the amount of \$347.50, the plaintiff was further entitled to interest on such sum, or any less sum they might find from January 31, 1906, to the time of the filing of the claim, but that plaintiff could not recover interest on any sum greater than \$347.50, the amount of the claim as filed, even though plaintiff should establish damages to the amount of \$375, as claimed in the complaint. The statute, after providing for the filing of the claim for damages, declares: "In every case such common carrier shall be liable for the amount of such loss and damages together with interest thereon from the date of the filing of the claim therefor until the payment thereof." The statute further provides "that unless such consignee or consignees recover in such action the full amount claimed, no penalty shall be recovered, for only the actual amount of the loss or damage with interest as aforesaid." As we construe the statute, interest on the amount of the actual loss established is recoverable from the time of the filing of the claim, whether the amount of such loss be greater or less than the amount for which the claim was filed, but that no penalty is recoverable unless the full amount for which the claim was filed is recovered. The charge, therefore, was not unfavorable to appellant so far as the question of interest was concerned, nor do we consider the charge was in respect to matters of fact, as there was no dispute as to the fact that the claim for \$347.50 was filed with the defendant January 31, 1906.

3. The court refused appellant's request to charge that section 1710, Civ. Code 1902, in so far as it imposed the duty to

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trace shipments as a condition of exemption from liability, is unconstitutional, as in violation of the interstate commerce clause of the federal Constitution. This question has been determined against appellant's view in *Skipper v. Seaboard Air Line R. R. Co.*, 75 S. C. 276, 55 S. E. 454, 7 L. R. A. (N. S.) 388, and *Venning v. A. C. L. R. R. Co.*, 78 S. C. 42, 58 S. E. 983.

4. The court refused appellant's request to charge that the penalty statute of February 23, 1903 (24 St. at Large, p. 81), is unconstitutional, as an attempt to regulate interstate commerce. The case of *Charles v. Atlantic Coast Line R. R. Co.*, 78 S. C. 36, 58 S. E. 927, and several other cases affirming the same, sustained the ruling of the court.

5. The court also refused to charge that Act May 13, 1903 (24 St. at Large, p. 1), is unconstitutional in so far as it involves the regulation of an interstate shipment of freight. Under the decision in *Venning v. Atlantic Coast Line R. R. Co.*, 78 S. C. 42, 58 S. E. 983, this instruction should have been given. The harmfulness of the error involved in the refusal to give this instruction is made manifest by reference to the next proposition.

6. The court instructed the jury, at the request of plaintiff's counsel: "If you find that the animal was not lost by the Atlantic Coast Line Railroad Company, but you find that it was lost by some other railroad company, then the Atlantic Coast Line Company would still be responsible for it by our statute, unless it informed the plaintiff within 40 days after they filed their claim, that is, 31st of January, 1906, when and where and by which carrier the loss occurred or was caused." The charge ignored the provisions of section 1710, which exonerated the terminal carrier from liability for loss not occurring on its lines, if, after due diligence, it is unable to trace the line on which the loss occurred, and by such charge the defendant was deprived of the defense afforded it by the statute by being thus made absolutely and unconditionally liable, even though the loss did not occur on its own lines, if it failed to inform the shipper when, where, and by which carrier the loss occurred. The effect of this instruction was practically to leave the liability of the defendant with respect to the animal thrown out by a connecting carrier to be determined under the statute declared void as to interstate shipments in the *Venning Case*. While it is true the burden was on the carrier to show that the loss of a mule from a single shipment, a car load of mules, did not occur on its lines (*Walker v. Railway Co.*, 76 S. C. 464, 57 S. E. 181; *Venning v. Ry. Co.*, 78 S. C. 48, 58 S. E. 983), the evidence was very strong, if not conclusive, that the lost mule died in a car or stock pen at Nashville, Tenn., and never came into the possession of the defendant, which received at its connection at Augusta, Ga., a car containing only 25 mules; nor is there much room for serious

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doubt that plaintiffs were promptly informed of the loss of the mule at Nashville, Tenn., since that information was stated on the receipt for freight given plaintiffs January 22, 1906, two days after the arrival of the car at Sumter, and the claim filed by plaintiffs on January 31st demanded damage for loss of mule thrown out of car at Nashville, Tenn. If this information was not as specific as that required by section 1710, defendant would still be entitled to have the jury exonerate it as to this particular loss, if the information given was all that it could give after the exercise of due diligence.

7. The amount of the verdict is explainable only on the theory that the jury allowed \$375, the amount of the damages claimed, with interest on \$347.50, the amount of the claim as filed, from time of filing to time of verdict, together with the penalty of \$50, which aggregate \$455. The \$375 includes \$100 for the dead mule, and \$275 for damages to the three injured mules. There was some evidence tending to support the claim of damages to the three injured mules to the extent of \$275. The presumption was that this injury occurred while the mules were in the possession of the defendant, and there was testimony that the 25 mules when delivered to the defendant at Augusta, Ga., were in apparently good condition. Hence the verdict to the extent of \$275, and interest from January 31, 1906, if possible, should stand. But the errors in the charge affect the verdict to the extent of \$100 and interest allowed for the dead mule thrown out at Nashville. The right to recover the penalty depends upon whether plaintiff should recover for the dead mule and the damaged mules to the full extent of the amount of the claim as filed, \$347.50. Hence the errors pointed out must also vitiate the verdict to the extent of the penalty.

The judgment of this court, therefore, is that the judgment of the circuit court be reversed, and a new trial granted, unless plaintiffs within 30 days from the filing of the remittitur herein remit from the verdict and judgment all in excess of \$275, and interest thereon from January 31, 1906.

MORRIS-SCARBORO-MOFFITT CO. v. SOUTHERN EXPRESS CO.

(Supreme Court of North Carolina, Nov. 27, 1907.)

[59 S. E. Rep. 667.]

Corporations—Legislative Regulation.—The state has the right to establish regulations for public service corporations, and to enforce the same by appropriate penalties, and in so doing the right of classification is largely referred to its discretion.

Constitutional Law—Equal Protection of Law—Carriers—Loss of Goods—Failure to Adjust Claim—Penalty—Statutory Regulation—Constitutionality.*—Revisal 1905, § 2644, which provides a penalty for a carrier's failure to adjust a loss within a certain time after a claim therefor is filed, does not deny the carrier the equal protection of the law, since the penalty is moderate in amount and imposed only after opportunity for investigation, does not attach unless full recovery is had in accordance with the demand made, and is in reasonable and direct enforcement of the duties incumbent upon common carriers, and imposed alike on all members of a given class.

Commerce—Power to Regulate—Powers Remaining in the States.†—In the absence of congressional inhibition, the state may establish laws and regulations on matters local in their nature which tend to enforce the proper performance of duties arising in the state, and which do not impede, but aid and facilitate, intercourse and traffic, though such action may incidentally affect interstate commerce.

Same—Carriers—Loss of Goods—Statutory Regulation.†—Revisal 1905, § 2644, which provides a penalty for a carrier's failure to adjust a loss in a shipment of goods from without the state within 90 days after a claim for such loss is filed with it, is not in violation of Const. U. S. art. § 8, conferring on Congress the right to regulate interstate commerce, since the penalty is in no sense a burden on interstate commerce, but is in aid of such traffic, and, in the absence of congressional legislation to the contrary, is a proper subject of state regulation.

Appeal from Superior Court, Randolph County; Moore, Judge.

Action by the Morris-Scarboro-Moffitt Company against the Southern Express Company for loss of goods and penalty for delay in settlement. From a judgment for plaintiff, defendant appeals. Affirmed.

There was evidence tending to show that defendant company, having undertaken, in the line of its duty as common carrier, to deliver certain goods to plaintiffs at Ashboro, N. C., the same

*See first preceding case, and foot-note.

†See fourth preceding case and foot-note.

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having been shipped from Cincinnati, Ohio, in breach of its contract and agreement delivered only part of said goods, the package in which they were shipped having been broken open, while in defendant's custody, and part of goods taken; that after said package had arrived at Ashboro, and been delivered to plaintiffs in its damaged and defective condition, plaintiffs duly filed a claim for damage, pursuant to statute, and defendant wrongfully failed and refused to adjust the claim for more than 90 days, etc., the claim being in amount as follows:

Ashboro, N. C., Sept. 25, 1906.

Bought of Morris-Scarboro-Moffitt Co., Wholesale and Retail Dealers in Dry Goods, Notions, Groceries, and General Merchandise.

To one (1) overcoat	\$20 00
To one (1) overcoat, less 10 per cent.	18 00
To one (1) coat and trousers	21 75
To part express	21
	<hr/>
	\$59 96

Issues were submitted and responded to by jury: "North Carolina, Randolph County. Superior Court, March Term, 1907. E. H. Morris, P. H. Morris, W. J. Scarboro, B. Moffitt, M. A. Moffitt, E. L. Moffitt, and E. Moffitt, Trading as Morris-Scarboro-Moffitt Co. v. Southern Express Company. (1) Is the defendant indebted to the plaintiffs on account of loss as alleged, if so, in what sum? Answer: Yes; \$59.96, and interest from September 26, 1906. (2) Was the claim of plaintiffs filed 90 days before the bringing of this suit? Answer: Yes."

There was judgment on the verdict for the amount of the loss and for the penalty of \$50, imposed by the statute, and defendant excepted and appealed, and assigned for error that the statute imposing the penalty (section 2634, Revisal 1905) was invalid as to interstate shipments, because in contradiction of article 1, § 8, of the Constitution of the United States, conferring upon Congress the power to regulate commerce with foreign nations and among the several states and with the Indian tribes.

John A. Barringer and T. H. Calvert, for appellant.
Elijah Moffit, for appellee.

HOKE, J. (after stating the facts as above). The statute in question enacts: "That every claim for loss of or damage to property while in possession of a common carrier shall be adjusted and paid within sixty days in case of shipments wholly within this state, and within ninety days in case of shipments from without the state, after the filing of such claim with the agent of such carrier at the point of destination of such shipment

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or the point of delivery to another common carrier: Provided, that no such claim shall be filed until after the arrival of the shipment, or of some part thereof, at the point of destination, or until after the lapse of a reasonable time for the arrival thereof. In every case such common carrier shall be liable for the amount of such loss or damage, together with interest thereon from the date of the filing of the claim therefor until the payment thereof. Failure to adjust and pay such claim within the periods respectively herein prescribed shall subject each common carrier so failing to a penalty of fifty dollars for each and every such failure, to be recovered by any consignee aggrieved in any court of competent jurisdiction: Provided, that unless such consignee recover in such action the full amount claimed, no penalty shall be recovered, but only the actual amount of the loss or damage, with interest as aforesaid. Causes of action for the recovery of the possession of the property shipped, for loss or damage thereto and for the penalties herein provided for may be united in the same complaint." It is established that the defendant company had charge of the goods, having undertaken to transport and deliver same as common carriers; that, when delivered to plaintiffs by defendant, the package had been broken open and goods to the value of \$59.75 had been taken out, which, with the proportional express charge of 21 cents, caused damage to plaintiff by reason of negligent default in the contract of carriage to the amount of \$59.96; that formal demand for this exact amount had been made and filed with defendant's agent, and the company had failed and refused to pay the same for more than 90 days. According to the provisions of the statute, therefore, the penalty would attach as a conclusion of law from the verdict and facts admitted, and, if the statute is valid, the recovery by plaintiffs must be sustained. We have held at the present term, in the case of *Efland v. Railroad*, 59 S. E. 355, the defendant's appeal, that as a general rule the state or government, having control of the matter, had the right to establish certain regulations for these public service corporations, and to enforce the same by appropriate penalties, and that in the fixing of such penalties the right of classification was referred largely to the legislative discretion, citing case of *Tullis v. Railway*, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192, and other authorities referred to and approved in that decision; the limitation on this right of classification being that established in the case of *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 151, 17 Sup. Ct. 255, 41 L. Ed. 666, as follows: "The mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and in all cases it must appear, not merely that a classification has been made, but also that it has been made on some reasonable ground, something

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which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection." The statute construed and upheld in *Efland's Case*, *supra*, was section 2642, Revisal 1905, imposing a penalty for wrongfully failing to return the amount of an overcharge, but the principle applies here, and shows that the statute now before us (section 2644) is not open to the objection sustained in *Ellis' Case*, *supra*, but is a penalty moderate in amount, imposed only after giving opportunity for investigation, does not attach unless full recovery is had in accordance with demand made, and, moreover, is in reasonable and direct enforcement of the duties incumbent upon common carriers, and imposed alike on all members of a given class. The statute, therefore, is not subject to the criticism that it denies to defendant the equal protection of the law, and we do not understand that the defendant insists on this objection.

It is strongly urged, however, that the law is in violation of article 1, § 8, of the federal Constitution, conferring on Congress the right to regulate commerce among the several states. The decisions of the Supreme Court of the United States have uniformly held that under this clause of the Constitution commerce between the states shall be free and untrammelled by any regulations which place a burden upon it, and these decisions also hold that, in the absence of inhibitive congressional legislation, a state may enact and establish laws and regulations on matters local in their nature, which tend to enforce the proper performance of duties arising within the state, and which do not impede, but aid and facilitate, intercourse and traffic, though such action may incidentally affect interstate commerce. *Calvert on Regulation of Commerce*, pp. 76, 152, 159. A case in this court (*Harrill v. Railroad*, 144 N. C. 532, 57 S. E. 383) well illustrates the distinction between the two positions, and the decision in that case is an apt authority, we think, in support of the present judgment. In *Harrill's Case* the consignee demanded his goods held by the carrier at the point of destination, tendering the lawful charges due for the shipment defendant's agent wrongfully refused to deliver. A recovery by consignee of a penalty imposed by a state statute for such wrong was sustained, and it was held as follows: "A railroad company owes it as a common law duty to deliver freight upon tender of lawful charges by the consignee, and, in the absence of a conflicting regulation by Congress, Revisal 1905, § 2633, imposing a penalty upon default of the railroad company therein, is constitutional and valid, and is an aid to, rather than a burden upon, interstate commerce." The same doctrine was announced and upheld in the case of *Bagg v. Railroad*, 109 N. C. 279, 14 S. E. 79, 14 L. R. A. 596, 26 Am. St. Rep. 569, as applied to a penalty imposed on the carrier for failure to start an interstate shipment within the time re-

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quired by law. In that well-sustained opinion Mr. Justice Avery, for the court, said: "The police power is the authority to establish such rules and regulations for the conduct of all persons as may be conducive to the public interest, and under our system of government is vested in the Legislatures of the several states of the Union; the only limit to its exercise being that the statute shall not conflict with any provision of the state Constitution, or with the federal Constitution, or laws made under its delegated powers. *Martin v. Hunter's Lessee*, 1 Wheat. (U. S.) 326, 4 L. Ed. 97; *State v. Moore*, 104 N. C. 714, 10 S. E. 143, 17 Am. St. Rep. 696; *State Tax on Railroad Cross-Receipts*, 15 Wall. (U. S.) 284, 21 L. Ed. 164. So long as the state legislation is not in conflict with any law passed by Congress in pursuance of its powers, and is merely intended and operates in fact to aid commerce and to expedite instead of hindering the safe transportation of persons or property from one commonwealth to another, it is not repugnant to the Constitution of the United States, and will be enforced either as supplementary to partial federal statutes relating to the same subject, or in lieu of such legislation, where Congress has not exercised its powers at all. *Morgan S. S. Co. v. Louisiana*, 118 U. S. 455, 6 Sup. Ct. 1114, 30 L. Ed. 237; *Train v. Boston Disinfecting Co.*, 144 Mass. 523, 11 N. E. 929, 59 Am. Rep. 113; *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508; *Railroad v. Alabama*, 128 U. S. 96, 9 Sup. Ct. 28, 32 L. Ed. 352; *Welton v. Missouri*, 91 U. S. 275, 23 L. Ed. 347; *Railroad v. Fuller*, 17 Wall. (U. S.) 560, 21 L. Ed. 710. The power of Congress over commerce between the states is, as a general rule, exclusive, and its inaction is equivalent to a declaration that it shall be free from all restraint which it has the right to impose, except by such statutes as are passed by the states for the purpose of facilitating the safe transmission of goods and carriage of passengers, and are not in conflict with any valid federal legislation. *Cooley's Const. Lim.* 595; *County of Mobile v. Kimball*, 102 U. S. 697, 26 L. Ed. 238; *Wilson v. McNamee*, 102 U. S. 572, 26 L. Ed. 234; *Wilson v. B. B., etc., Co.*, 2 Pet. (U. S.) 245, 7 L. Ed. 412; *Pound v. Turck*, 95 U. S. 459, 24 L. Ed. 525; *Turner v. Maryland*, 107 U. S. 38, 2 Sup. Ct. 44, 27 L. Ed. 370; *Morgan S. S. Co. v. Louisiana*, *supra*." A like decision has been made on a statute similar to the one we are now considering in our neighboring state of South Carolina—*Porter v. Railway*, 63 S. C. 169, 41 S. E. 108, 90 Am. St. Rep. 670—where it was held as follows: "The act (22 St. at Large, p. 443) providing a penalty on common carriers for failure to pay or to refuse to pay damages, etc., to freight within 60 days, does not conflict with those sections of the state and federal Constitutions providing for the equal protection of the laws to all, nor with the interstate commerce clause of the federal Con-

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stitution, or acts of Congress relating thereto." These opinions are in accordance with the principle established by numerous and well-considered decisions of the United States Supreme Court, which are alone authoritative on such questions. *Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238; *Smith v. Alabama*, 124 U. S. 465-476, 8 Sup. Ct. 564, 31 L. Ed. 508; *Telegraph Co. v. James*, 162 U. S. 650, 16 Sup. Ct. 934, 40 L. Ed. 1105; *Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166; *Railway v. Solan*, 169 U. S. 133-137, 18 Sup. Ct. 289, 42 L. Ed. 688; *Railway v. Florida*, 203 U. S. 261, 27 Sup. Ct. 109, 51 L. Ed. 175. In *Smith v. Alabama*, *supra*, Mr. Justice Mathews for the court said: "It is among these laws of the states, therefore, that we find provisions concerning the rights and duties of the common carriers of persons and merchandise, whether by land or by water, and the means authorized by which injuries resulting from the failure properly to perform their obligations may be either prevented or redressed. A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable according to the laws of the state for acts of nonfeasance or misfeasance committed within its limits. If he fail to deliver goods to the proper consignee at the right time or place, he is liable in an action for damages under the laws of the state in its courts; or, if by negligence in transportation he inflicts injury upon the person of a passenger brought from another state, a right of action for the consequent damage is given by the local law. In neither case would it be a defense that the law giving the right to redress was void as being an unconstitutional regulation of commerce by the state. This, indeed, was the very point decided in *Sherlock v. Alling*, above cited." In *Railway v. Solan*, *supra*, Mr. Justice Gray, for the court, said: "A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable, according to the law of the state, for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another state, the right of action for the consequent damage is given by the local law. It is equally within the power of the state to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries, which, after they have been inflicted, the state has the power to redress and to punish. The rules prescribed for the construction of railroads; and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not in themselves regulations of interstate commerce, although

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they control, in some degree, the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits."

The case before us comes clearly within the principle of these decisions. The penalty is imposed, not directly upon interstate commerce itself, or during the transportation of the goods, but it arose by reason of default on the carrier's part after the transportation had terminated, and is in enforcement of the duty incumbent upon it by the law to adjust and pay for damages arising by reason of its negligent default. The penalty is in no sense a burden on intercourse and traffic between the states but it is in aid of such traffic, and, in the absence of congressional legislation to the contrary, is a proper subject of state regulation. We were referred by counsel to cases of *Railway v. Murphey*, 196 U. S. 195, 25 Sup. Ct. 218, 49 L. Ed. 444, *Railway v. Mayes*, 201 U. S. 321, 26 Sup. Ct. 491, 50 L. Ed. 772, and *McNeill v. Ry.*, 202 U. S. 543, 26 Sup. Ct. 722, 50 L. Ed. 1142, but we do not think that these decisions are in conflict with the views we have held to be controlling in the case before us. As we understand them, they all proceed upon the idea, not that the regulations in question were void because they affected in some way interstate commerce, but because they interfered directly with intercourse and traffic between the states, and were of a character that imposed an undoubted and distinct burden upon them. A careful perusal of either of these cases will show this to be the correct deduction from the decisions. Thus Mr. Justice Brown in *Mayes Case*, *supra* (page 328 of 201 U. S., page 492 of 26 Sup. Ct. [50 L. Ed. 772]), says: "The exact limit of lawful legislation upon this subject cannot in the nature of things be defined. It can only be illustrated from the decided cases by applying the principles therein enunciated, determining from these whether in the particular case the rule be reasonable or otherwise. That states may not burden instruments of interstate commerce, whether railways or telegraphs, by taxation, by forbidding the introduction into the state of articles of commerce generally recognized as lawful, or by prohibiting their sale after introduction, has been so frequently settled that a citation of authority is unnecessary. Upon the other hand, the validity of local laws designed to protect passengers or employees or persons crossing the railroad tracks, as well as other regulations intended for the public good, are generally recognized." And on page 329 of 201 U. S., page 493 of 26 Sup. Ct. (50 L. Ed. 772): "While there is much to be said in favor of laws compelling railroads to furnish adequate facilities for the transportation of

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both freight and passengers, and to regulate the general subject of speed, length, and frequency of stops, for the heating, lighting, and ventilation of passenger cars, the furnishing of food and water to cattle and other live stock, we think an absolute requirement that a railroad shall furnish a certain number of cars at a specified day, regardless of every other consideration except strikes and other public calamities, transcends the police power of the state, and amounts to a burden upon interstate commerce. It makes no exception in cases of sudden congestion of traffic, an actual inability to furnish cars by reason of their temporary and unavoidable detention in other states, or in other places within the same state. It makes no allowance for interference of traffic occasioned by wrecks or other accidents upon the same or other roads, involving a detention of traffic, the breaking of bridges, accidental fires, washouts or other unavoidable consequences of heavy weather." And on page 330 of 201 U. S., page 493 of 26 Sup. Ct. (50 L. Ed. 772): "Although the statute in question may have been dictated by a due regard for the public interest of the cattle raisers of the state, and may have been intended merely to secure promptness on the part of the railroad companies in providing facilities for speedy transportation, we think that in its practical operation it is likely to work a great injustice to the roads, and to impose heavy penalties for trivial, unintentional and accidental violation of its provisions, when no damage could actually have resulted to the shippers." And, again, on page 331: "While railroad companies may be bound to furnish sufficient cars for their usual and ordinary traffic, cases will inevitably arise where by reason of an unexpected turn in the market, a great public gathering, or an unforeseen rush of travel, a pressure upon the road for transportation facilities may arise, which good management and a desire to fulfill all its legal requirements cannot provide for, and against which the statute in question makes no allowance. Although it may be admitted that the statute is not far from the line of proper police regulations, we think that sufficient allowance is not made for the practical difficulties in the administration of the law, and that, as applied to interstate commerce, it transcends the legitimate powers of the Legislature." These citations we think give clear indication that we have correctly interpreted the opinion, and that the decision in no way conflicts with the disposition we have made of the present case.

We find no error in the record to the defendant's prejudice, and the judgment below is affirmed.

No error.

MATHESON *v.* SOUTHERN RY. CO.

(Supreme Court of South Carolina, Feb. 22, 1908.)

[60 S. E. Rep. 437.]

Carriers—Carriage of Goods—Loss—Special Damages.*—Where, on shipment of fertilizer, there was no notice to the carrier of any special use to which it was to be applied or of such scarcity of fertilizer as to prevent another purchase of a like amount by consignee, consignee was not entitled to special damages for failure to deliver the fertilizer.

Same.*—Where, after notice to a carrier after shipment of fertilizer of the special use to which it was to be applied, it made dili-

*For the authorities in this series on the subject of the right to recover special damages against a carrier of freight as affected by the carrier's knowledge or lack of knowledge of the urgency of the shipment, or other special circumstances, see *Patterson v. Illinois Cent. R. Co.* (Ky.), 24 R. R. R. 434, 47 Am. & Eng. R. Cas., N. S., 434, (one who shipped meal to himself for his cattle was not entitled to recover special damages for loss in weight of the cattle, or for extra work in attempting to care for them and secure proper feed, arising from further delay by the carrier in delivering the meal, after the lapse of a reasonable time from his giving the carrier notice of the special circumstances making the shipment urgent); *Webb v. Atlantic Coast Line R. Co.* (S. Car.), 23 R. R. R. 284, 46 Am. & Eng. R. Cas., N. S., 284 (failure to make sales because of delay in delivering traveling salesman's trunk); *McKerall & Murchison v. Atlantic, etc., R. Co.* (S. Car.), 23 R. R. R. 281, 46 Am. & Eng. R. Cas., N. S., 281 (notice to carrier that freight was intended for particular purpose, given after it was shipped, did not render carrier liable for special damages from delay); *Milhous v. Atlantic Coast Line R. Co.* (S. Car.), 22 R. R. R. 779, 45 Am. & Eng. R. Cas., N. S., 779 (in action for delay in delivering baggage containing dental tools, there could be no recovery for what passenger would have made by working at his profession, because of absence of allegation and proof of notice to carrier of the alleged special circumstances); *Turner v. Southern Ry.* (S. Car.), 21 R. R. R. 288, 44 Am. & Eng. R. Cas., N. S., 288 (measure of damages for loss of baggage as affected by the fact that carrier had no notice of special circumstances); *Choctaw, etc., R. Co. v. Jacobs* (Okla.), 20 R. R. R. 761, 44 Am. & Eng. R. Cas., N. S., 761 (where carrier had been informed of special circumstances); extensive note, 10 R. R. R. 481, 33 Am. & Eng. R. Cas., N. S., 481; *Welman v. Southern Ry.* (S. Car.), 20 R. R. R. 721, 43 Am. & Eng. R. Cas., N. S., 721 (insufficiency of evidence to show notice to carrier that it would be subject to special damages in case of nondelivery of certain baggage); *Eller v. Carolina & W. Ry. Co.* (N. Car.), 18 R. R. R. 609, 41 Am. & Eng. R. Cas., N. S., 609 (mental anguish of prospective groom caused by injury to trousseau of his bride to be, was too remote a form of damage to entitle groom to recover therefor against railroad, which did not know of the intended marriage); *Lewark v. Norfolk & S. R. Co.* (N. Car.), 14 R. R. R. 420, 37 Am. & Eng. R. Cas., N. S., 420 (carrier was not liable for consequences of loss of consignment of ice, where it did not appear that it knew for what purpose it was intended); *Illinois Cent. R. Co. v. Johnson &*

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gent and prompt effort to find and deliver the same, it was not liable for special damages for failure to do so, within the rule that notice to a carrier subsequent to the receipt of goods will render it liable for damages accruing after that time because of negligence in not tracing and finding the goods.

Same—Punitive Damages.†—Where, in an action for the loss of freight, reckless or willful disregard of consignee's rights or even in-

Fleming (Tenn.), 20 R. R. R. 727, 43 Am. & Eng. R. Cas., N. S., 727 (certain information did not give the carrier notice that plaintiff had a contract which would be forfeited in the event of a failure to deliver a certain well pipe promptly); *American Express Co. v. Jennings* (Miss.), 16 R. R. R. 546, 39 Am. & Eng. R. Cas., N. S., 546 (defendant carrier could not be held liable for special damages from the idleness of a cotton gin, caused by loss of machinery, in absence of evidence either that it had notice of the special circumstances before it received the shipment, or that the initial carrier contracted for through shipment, and had such notice before receiving the shipment); *Crutcher v. Choctaw, etc., R. Co.* (Ark.), 16 R. R. R. 661, 39 Am. & Eng. R. Cas., N. S., 661 (carrier to be liable for special damages for delay in transportation of freight, must have had notice, before or at the time the contract was made, of the special circumstances, it not being enough that it received such notice during the delay); *Traywick v. Southern Ry. Co.* (S. Car.), 17 R. R. R. 678, 40 Am. & Eng. R. Cas., N. S., 678 (where carrier had no notice of the purpose for which the delayed machinery was needed); *R. A. Lee & Co. v. St. Louis, etc., Ry. Co.* (N. Car.), 14 R. R. R. 260, 37 Am. & Eng. R. Cas., N. S., 260 (for delay in delivery of freight, only damages contemplated by the parties are recoverable); *Weston v. Boston & M. R. R.* (Mass.), 19 R. R. R. 718, 42 Am. & Eng. R. Cas., N. S., 718 (for delay in transportation of theatrical properties, which carrier knew were intended for use in a widely advertised exhibition, shipper was entitled to recover his ordinary gross earnings, less such expenses, if any, as the deprivation of use of the property saved him from); *Illinois Cent. R. Co. v. Johnston & Fleming* (Tenn.), 20 R. R. R. 727, 43 Am. & Eng. R. Cas., N. S., 727 (mere delivery of iron pipe for the boring of a well to a carrier for transportation was insufficient of itself to give notice to the carrier of the existence of a time contract between the consignee and the owner of the well which would probably be affected by delay in the delivery; and effect of notice to carrier after goods have been shipped of circumstances which rendered special damages a probable consequence of delay); *Wessner & White Mfg. Co. v. Atlantic Coast Line R. Co.* (S. Car.), 19 R. R. R. 342, 42 Am. & Eng. R. Cas., N. S., 342 (complaint must allege that carrier knew of the use to which the delayed freight was to have been put, and that special injury would result from delay, and that carrier contracted to transport with reference to such damages); *Choctaw, etc., Ry. Co. v. Rolfe* (Ark.), 16 R. R. R. 525, 39 Am. & Eng. R. Cas., N. S., 525 (special damages for failure to furnish cars cannot be recovered unless facts leading to such damages were made known to carrier); *Bourland v. Choctaw, O. & S. Ry. Co.* (Tex.), 19 R. R. R. 61, 42 Am. & Eng. R. Cas., N. S., 61 (where consignee, when applying for delivery of cattle feed, after its arrival at destination, stated that failure to get it would cause him great loss, he was entitled to special damages for delay in delivering it, although notice of the peculiar facts was not given before or at the time of making the contract of carriage).

†For the authorities in this series on the question whether puni-

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difference to them does not appear, but all the testimony tends to show a loss by theft from the carrier or some mistake, which after diligent effort it cannot account for, the carrier is not liable for punitive damages.

Same—Persons Entitled to Sue—Consignee.—Where vendor undertakes to deliver at a certain place, delivery to the carrier is not delivery to the consignee entitling him to sue for a loss, but the carriage of the goods to that place is at vendor's risk, and he alone may sue for loss.

Same—Rescission of Contract.—Where, after failure to deliver freight, consignee demanded back and received from vendor the price, there was a rescission of the sale precluding a recovery by consignee from the carrier for the failure to deliver.

Same—Contracts Limiting Liability—Validity.†—A clause of a bill of lading fixing the carrier's liability for loss at the value at the point of shipment is reasonable and valid, and precludes recovery by consignee for the difference between the market value at the place of delivery and what he paid.

Appeal from Common Pleas Circuit Court, Fairfield County;
Chas. G. Dantzler, Judge.

Action by A. W. Matheson against the Southern Railway Company. Judgment for defendant, and plaintiff appeals. Affirmed.

T. M. Cathcart, for appellant.

B. L. Abney, for respondent.

WOODS, J. In this action the plaintiff, A. W. Matheson, seeks to recover of the Southern Railway Company \$1,995 for the loss of two tons of fertilizer; the position taken being that the

tive damages may be recovered against a carrier of freight, see extensive note, 10 R. R. R. 481, 33 Am. & Eng. R. Cas., N. S., 481 (measure and elements of damages for delay); *Webb v. Atlantic Coast Line R. Co.* (S. Car.), 23 R. R. R. 284, 46 Am. & Eng. R. Cas., N. S., 284 (any willful or wanton failure to transport baggage with reasonable dispatch is a willful, wanton violation of a public duty, authorizing punitive damages); *Yazoo, etc., R. Co. v. Christmas* (Miss.), 21 R. R. R. 451, 44 Am. & Eng. R. Cas., N. S., 451 (punitive damages not recoverable for delay caused by mistake of carrier's agent in billing goods to wrong place); *Sullivan v. Southern Ry.* (S. Car.), 20 R. R. R. 669, 43 Am. & Eng. R. Cas., N. S., 669 (punitive damages were recoverable for refusal to check passenger's baggage); *Augusta Brokerage Co. v. Central of Georgia Ry. Co.* (Ga.), 15 R. R. R. 4, 38 Am. & Eng. R. Cas., N. S., 4 (exemplary damages for willful violation of rule of railroad commission made to prevent discrimination in furnishing facilities).

†See second foot-note appended to *Broadwood v. Southern Express Co.* (Ala.), 25 R. R. R. 562, 48 Am. & Eng. R. Cas., N. S., 562; foot-notes appended to *Southern Express Co. v. Stevenson* (Miss.), 23 R. R. R. 547, 46 Am. & Eng. R. Cas., N. S., 547.

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facts warrant the recovery of both special and punitive damages in addition to the value of the goods lost. The circuit judge directed a verdict for the defendant. The inquiry, then, is whether there was any evidence upon which a verdict for any amount in favor of the plaintiff could have been rendered.

These were the undisputed facts before the court: The plaintiff in March, 1905, bought of Springs & Shannon, merchants at Camden, two tons of Pocomoke guano, to be shipped to him at Ridgeway, paying them the purchase money, \$32.36, in cash. Springs & Shannon immediately thereafter, on 24th March, 1905, bought two tons of fertilizer from Pocomoke Guano Company, which company, as directed by Springs & Shannon, delivered the guano to the defendant railway company consigned to the plaintiff at Ridgeway, S. C. The guano company had no contract with the plaintiff, and sent the bill of lading, which named the plaintiff as consignee to Springs & Shannon. After shipment the plaintiff inquired for the guano a number of times at defendant's Ridgeway freight office, and informed the defendant's local agent of his intention to use it on his crop, and of the necessity for him to have it in time. The agent promised to send a tracer for the guano, and the evidence of the officers of the railway company that diligent effort was made to find and deliver the guano was undisputed. The plaintiff testified he waited on the guano until he was convinced, if it came at all, it would be too late for the use he wished to make of it, and then demanded and received back from Springs & Shannon the purchase price. The plaintiff further testified he was unable to procure guano after it became manifest this fertilizer would not be delivered, and that the yield of his land was far less than it would have been if he had been able to use the guano. After repayment to the plaintiff, Springs & Shannon returned the bill of lading to the Pocomoke Guano Company, and received credit on their books for the price of the guano. Thereupon the Pocomoke Guano Company demanded and received from the defendant railway company \$32.36, the value of the goods at Norfolk.

There is no foundation for special damages. The evidence discloses nothing more than an ordinary shipment of fertilizer, with no notice to the carrier at the time it received the goods of any special use to which it was to be applied, or of such scarcity of fertilizer as to prevent the purchase of two tons of other guano by the plaintiff. *Traywick v. Railway Co.*, 71 S. C. 82, 50 S. E. 549, 110 Am. St. Rep. 563; *Wesner, etc., Co. v. Railway*, 71 S. C. 211, 50 S. E. 789; *Guess v. Railway Co.*, 73 S. C. 264, 53 S. E. 421; *Strange v. Railway Co.*, 77 S. C. 182, 57 S. E. 724. In *McKerall v. Railroad Co.*, 76 S. C. 342, 56 S. E. 965, the following language from 6 Cyc. 450, is quoted with

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approval: "Subsequent notice, however, of the effect of the further delay after the goods should have been delivered may render the carrier liable for damages accruing after that time by reason of negligence in not tracing and finding the goods." Assuming that there was notice given of special emergency after the shipment, there was not a particle of evidence of negligence in not tracing and finding the goods. On the contrary, there was undisputed evidence of diligent and prompt effort to find and deliver. The case as to special damages therefore entirely fails. So far from there being evidence of reckless or willful disregard of plaintiff's rights or even indifference to them, all the testimony on the subject tended to show a loss by theft from the carrier or by some mistake, which the defendant after diligent effort could not account for. To allow punitive damages under such conditions would not only be unjust, but result either in bankruptcy to common carriers or such increase in freight rates as to impose an intolerable burden on the business of the country.

The remaining question is whether there was any evidence of actual damages recoverable by the plaintiff. The plaintiff, it is true, paid in advance for two tons of Pocomoke guano, but the sellers undertook to deliver it to him at Ridgeway; and until delivery at that place ownership did not pass to the buyer, for the goods were still at the risk of the seller, loss, if any, falling on him. The general rule is that delivery to the carrier is delivery to the consignee, and on such delivery the title passes to the consignee. The goods being then at consignee's risk, he has the right of action for their loss. But, where the vendor undertakes to deliver at a certain place, the carriage of the goods to that place is at his risk, and the title and right of action for their loss remains in him. *Parker v. Jacobs*, 14 S. C. 116, 37 Am. Rep. 724; *Elliott on Railroads*, § 1692; *Benjamin on Sales*, § 1040; *Hale on Carriers*, p. 547; 6 Cyc. 511; 24 Am. & Eng. Ency. 1050; *McNeal v. Braun*, 53 N. J. Law, 617, 23 Atl. 687, 26 Am. St. Rep. 441, and note; *Detroit, etc., R. R. Co. v. Malcomson*, 144 Mich. 172, 107 N. W. 915, 115 Am. St. Rep. 390; *Neimeyer L. Co. v. Burlington & M. R. R. Co.*, 54 Neb. 321, 74 N. W. 670, 40 L. R. A. 535. The remedy of the purchaser in such case is against the seller who has failed to perform the contract of sale.

But, if the law were otherwise on this point, the action of the plaintiff in demanding and receiving from Springs & Shannon the purchase money of the fertilizer cannot be viewed in any other light than a rescission of the sale, leaving the fertilizer, wherever it might be, on their hands. Even if the title had ever passed from Springs & Shannon, as between them and the plaintiff, by this rescission it went back to them, and with it the right of action for the loss. 4 *Elliott on Railroads*, 1692; *Turney v.*

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Wilson, 7 Yerg. (Tenn.) 340, 27 Am. Dec. 516, and note; **Hutchinson on Carriers**, § 1319; **Railway Co. v. Com. Guano Co.**, 103 Ga. 590, 30 S. E. 555.

In addition to this, the plaintiff having received back from the seller the purchase price, \$32.36, and the carrier having refunded that sum to the seller in full settlement, the rightful demands of all parties were met before this suit was brought. True, there was evidence that the fertilizer was worth \$1.50 per ton more at Ridgeway than plaintiff had paid for it, and it was contended he was at least entitled to recover this difference in market value; but, if there were no other difficulty in the way of the recovery of this difference in value, the bill of lading fixes the liability of the carrier for loss at the value of the goods at the point of shipment, which in this case was Norfolk, Va. As a general rule, liability for the loss of goods by the carrier is measured by the value at the place of destination. **Wallingford v. Railroad Co.**, 26 S. C. 268, 2 S. E. 19; **Turner v. Railroad Co.**, 75 S. C. 58, 54 S. E. 825, 7 L. R. A. (N. S.) 188; **McKerall v. Railroad Co.**, 76 S. C. 342, 56 S. E. 965. But a contract fixing the liability for loss at the value at place of shipment is held to be reasonable and valid. **Live Stock Co. v. Kansas, etc., R. R. Co.**, 100 Mo. App. 674, 75 S. W. 782; **So. Pac. Co. v. Phillipson** (Tex. Civ. App.) 39 S. W. 958; 6 Cyc. 401. While this precise point was not involved, it falls within the principle laid down in **Johnstone v. Railroad Co.**, 39 S. C. 55, 17 S. E. 512.

The judgment of this court is that the judgment of the circuit court be affirmed.

BRAND v. ILLINOIS CENT. R. CO.

(Court of Appeals of Kentucky, March 19, 1908.)

[108 S. W. Rep. 356.]

Carriers—Carriage of Goods—Delay of Shipment—Damages.*—

In order to recover lost profits as special damages from a carrier for delay in the shipment of goods, the carrier at the time of the delivery of the shipment to it must have notice of the use for which the goods are intended, or the character of the goods must be such that such may be reasonably inferred therefrom.

Same—Connecting Carriers—Loss of Profits.—Notice to an initial carrier that goods are to be used for a certain purpose at the place of delivery is not notice to the connecting carrier of such use, so as to be a basis of a recovery of loss of profits caused by delay in shipment.

Same.—The acceptance by a connecting carrier of a carload of buggies for delivery is not notice to the carrier that the only time buggies could be sold at the place of delivery was between April 4th, the time the buggies should have been delivered, and April 17th, when they were delivered, so as to be a basis of the recovery of loss of profits caused by the delay in shipment.

Appeal from Circuit Court, Graves County.

"Not to be officially reported."

Action by A. L. Brand against the Illinois Central Railroad Company for damages from delay in delivery of good. From a judgment sustaining a demurrer to, and dismissing, the complaint, plaintiff appeals. Affirmed.

W. J. Webb, for appellant.

Trabue, Doolan & Cox, J. M. Dickinson, Robbins & Thomas, and *R. G. Robbins*, for appellee.

CLAY, C. On April 1, 1903, appellant, A. L. Brand, was engaged in the retail buggy business at Mayfield, Ky. On that day the Victor Carriage Company delivered to the Cincinnati, Hamilton & Dayton Railroad Company, at Cincinnati, a car load of buggies consigned to appellant at Mayfield, Ky., which it transported and delivered to the appellee, Illinois Central Railroad Company, a connecting carrier, on April 2, 1903. On February 24, 1905, appellant instituted this action against appellee, charging that the latter, by reasonable diligence, could have delivered said buggies to him in Mayfield, Ky., by April 4, 1903, but that it failed to deliver the same within a reasonable time, and did not, in fact, deliver the same to appellant until the 17th day of

*See preceding case, and foot-notes.

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April. The petition further alleges that appellant was engaged in Mayfield, Ky., in the business of selling buggies and other vehicles, and that "application was made to him daily for buggies, but he was unable to make sales because said buggies had not arrived, and by reason of defendant's failure to deliver said buggies within a reasonable time he was prevented from selling all of said buggies, which he would have sold if they had been delivered;" that he could and would have sold said buggies at a profit of \$20 on each, or the sum of \$600, for which he asked judgment against appellee. To the petition alleging the above facts a demurrer was sustained. Thereafter appellant amended his petition and alleged that the said buggies, consisting of 30 in all, were ordered from the Victor Carriage Company for the purpose of being resold by him by retail; that the season for retailing such vehicles commenced April 1, 1903, and during the first half of that month was the best time for the sale of said vehicles; that by the exercise of ordinary care and diligence, considering the character of the merchandise and quantity of the same, appellee would reasonably infer that the buggies were being shipped for the purpose of retailing and selling the same; that the Victor Carriage Company knew this was the purpose for which appellant had ordered said buggies. To the petition as amended a demurrer was also sustained, and, appellant declining to plead further, his petition and amended petition were dismissed.

It will be observed that appellant seeks to recover special damages in the form of profits which he alleges he would have made had the goods been delivered to him on April 4th. The law is well settled that in order to recover such special damages the carrier, at the time of the delivery of the shipment to it, must have notice of the use for which the goods are intended, or the character of the goods must be such that such use may be reasonably inferred therefrom. *Illinois Central Railroad Company v. Nelson*, 97 S. W. 757, 30 Ky. Law Rep. 114. Appellant does allege that the Victor Carriage Company knew the purpose for which he had ordered the buggies; but this knowledge on the part of that company could in no way affect appellee. The petition does not charge that appellee had such notice. It does charge, however, that the character of the merchandise and the quantity of the same were such that appellee could reasonably infer that the goods were being shipped for the purpose of retailing and selling the same. No doubt appellee might have inferred that so large a shipment of buggies received by it was consigned to appellant for the purpose of being placed upon the market and sold; but it could not infer from the character of the shipment that the only time the buggies could be sold was between April 4th, when appellant claims they should have been

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delivered, and April 17th, when they were delivered. No facts are pleaded which would indicate any information on the part of appellee that the buggies would sell for more on one day in April than on any other day in that month. Where a contract has been broken, the damages which may be recovered for the breach are such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract. Appellee not having notice, and the character of the goods not being such as that it could reasonably infer therefrom that the only time the buggies could be placed upon the market and sold at a profit was early in the month of April, we do not think appellee could be held liable for special damages in the form of profits which could have been realized from the sale of the buggies only during the early part of that month.

For the reasons given, the judgment is affirmed.

LAMBERT-MURRAY CO. v. SOUTHERN EXPRESS CO.

(Supreme Court of North Carolina, Dec. 11, 1907.)

[59 S. E. Rep. 991.]

Carriers—Express Companies—Failure to Deliver within Reasonable Time—Damages.*—Where, owing to the failure of an express company to deliver a box containing souvenirs, suitable for sale only in the city to which sent, within a reasonable time, they were without market value, the measure of damages was the market value of the souvenirs when shipped, though the express company was not informed of the contents of the box.

Appeal from Superior Court, Buncombe County; Cooke, Judge.

Action by the Lambert-Murray Company against the Southern Express Company. Judgment for plaintiff, and defendant appeals. Affirmed.

The action began before a justice of the peace, and on an appeal in the superior court the following facts were agreed: "The plaintiff company delivered to the defendant at Asheville, N. C., on February 21, 1906, a plain, closed box for shipment to New Orleans, La. The box had no writing on it, except the address, 'A. I. Hirsch, New Orleans, La.', and the defendant was not told what the box contained, nor that any loss would result from delay. The box arrived in New Orleans February 24, 1906, but was not delivered to the consignee; the defendant being guilty

*See preceding case, and foot-note.

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of negligence in this respect. On March 31, 1906, after four days' notice to the defendant of their intention to do so, the plaintiff sent a duplicate shipment to Hirsch. Claim was made to the defendant by the plaintiff for damages, liability was denied, and suit was begun April 30, 1906. On the hearing before a justice of the peace April 30, 1906, the original shipment was tendered to the plaintiff by the defendant, and refused by it. The box contained rhododendron souvenirs, marked 'New Orleans,' and suitable for sale only in that city, being made to order. The goods when shipped were worth \$12.60, which is the amount sued for, but on the day suit was brought, April 30, 1906, they had no market value and have since had none, although they have sustained no physical injury, having suffered their loss of value on account of failure on part of the defendant to deliver within a reasonable time." The court rendered judgment for \$12.60, with interest from February 21, 1906. Defendant appealed.

Julius C. Martin and Geo H. Wright, for appellant.

CLARK, C. J. The negligence is admitted. The only controversy is as to the measure of damages. The defendant at the trial tendered to the plaintiff the return of the original box and contents, but admits that at that time they had no "market value, and have since had none, although they have sustained no physical injury, having suffered their loss of value on account of failure on part of the defendant to deliver within a reasonable time." As the defendant admits that the loss of value was caused by its own negligence, it is difficult to conceive any reason why it should not be responsible for the damage caused by its own wrong, undertook, for a consideration, to carry the goods speedily and safely to its destination. It did not do so. It has offered no excuse; indeed, it frankly says that it has none. If it had been important to know the contents of the box to spur it to diligence, it does not appear that it inquired. The very nature of its business and the application for its services were notice that prompt delivery was of the essence of the contract. The defendant relies upon the well-known doctrine of *Hadley v. Baxendale*, 9 Exch. 341, that the damages for breach of contract should be "such as may fairly and reasonably be considered either as arising naturally—i. e., according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of it." The defendant did not inquire as to the contents of the box, but, when it received the box for quick transportation, what may more reasonably be supposed to have been in the contemplation of both parties than that, if by reason of the negli-

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gence of the defendant the package was so delayed in transmission as to become wholly or partially worthless, for any reason, the carrier, who, for a price, had stipulated for prompt and safe delivery, should be liable for any damage or loss caused by such negligence? A carrier by ordinary freight train is insurer of safe delivery and within reasonable time. An express company guarantees the promptest possible delivery, and is liable for any deterioration in the value of the goods caused by failure to fill that contract.

Affirmed.

SIEMONSMA v. CHICAGO, M. & ST. P. RY CO.

(Supreme Court of Iowa, March 11, 1908.)

[115 N. W. Rep. 230.]

Appeal—Rulings on Evidence—Review.—Under Code, § 4101, authorizing appeals from designated orders, no appeal lies from a ruling on evidence, and such a ruling is reviewable only where the error inheres in the judgment, and the appeal is brought to secure a modification or reversal thereof.

Same—Theory of Cause.—The Supreme Court in disposing of an appeal must proceed upon the theory adopted in the trial court.

Carriers—Carriage of Freight—Duty to Transport.*—At common law and under Code, § 2116, requiring every railway company to receive and transport freight with reasonable despatch, a carrier accepting live stock for shipment must transport the same with all reasonable despatch to the point of destination.

Same—Limiting Liability—Contracts—Validity.†—Under Code, § 2074, providing that no contract shall exempt any railway company from the liability of a carrier, the liability of a carrier to transport a

*See extensive note, 23 R. R. R. 212, 46 Am. & Eng. R. Cas., N. S., 212; foot-notes appended to *Choctaw & M. Ry. Co. v. Walker* (Ark.), 9 R. R. R. 784, 32 Am. & Eng. R. Cas., N. S., 784, where all the authorities in this series preceding it are collected; foot-notes appended to *Missouri Pac. Ry. Co. v. Peru-Van Zandt Imp. Co.* (Kan.), 25 R. R. R. 647, 48 Am. & Eng. R. Cas., N. S., 647; *Goodin & Goodin v. Southern Ry. Co.* (Ga.), 25 R. R. R. 590, 48 Am. & Eng. R. Cas., N. S., 590; foot-notes appended to *Yazoo & M. V. R. Co. v. Blum Co.* (Miss.), 24 R. R. R. 86, 47 Am. & Eng. R. Cas., N. S., 86; second foot-note appended to *Nelson v. Chicago, etc., Ry. Co.* (Neb.), 23 R. R. R. 613, 46 Am. & Eng. R. Cas., N. S., 613.

†For the authorities in this series on the question of the validity of contracts purporting to exempt a common carrier from liability for injuries from delay in the transportation or delivery of freight, see *Parker v. Atlantic Coast Line R. Co.* (N. Car.), 11 R. R. R. 673, 34 Am. & Eng. R. Cas., N. S., 675; *Nelson v. Great Northern Ry. Co.* (Mont.), 9 R. R. R. 311, 32 Am. & Eng. R. Cas., N. S., 311.

For the authorities in this series on the question whether a common

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shipment with reasonable despatch cannot be avoided or limited by contract of shipment, and, where live stock is accepted for shipment, the shipper is not debarred from recovery for an unreasonable delay, because the contract of shipment stipulated that the carrier should not be responsible for damages arising out of any delay.

Negligence—Burden of Proof.—Where a right to damages is predicated on negligence, the proof must come from him who asserts the failure of duty.

Carriers—Delay in Transportation—Negligence—Evidence.—In an action against a carrier for delay in transporting live stock, evidence held insufficient to support a finding that the carrier failed to transport the shipment with reasonable despatch.

Appeal from District Court, Sioux County; Wm. Hutchinson, Judge.

carrier can limit its liability for injuries from its negligence, see footnotes appended to *Morse v. Canadian Pac. Ry. Co. (Me.)*, 9 R. R. R. 296, 32 Am. & Eng. R. Cas., N. S., 296, where all those preceding it are collected; *Lake Erie & W. R. Co. v. Holland (Ind.)*, 9 R. R. R. 735, 32 Am. & Eng. R. Cas., N. S., 735 (carrier cannot free itself of duty to furnish proper cars); *Hutton v. Southern Ry. Co. (S. Car.)*, 24 R. R. R. 382, 47 Am. & Eng. R. Cas., N. S., 382 (negligent loss of baggage of person traveling on free pass); *St. Louis, etc., R. Co. v. Phillips (Okl.)*, 22 R. R. R. 201, 45 Am. & Eng. R. Cas., N. S., 201; *Reynolds v. Great Northern Ry. Co. (Wash.)*, 20 R. R. R. 70, 43 Am. & Eng. R. Cas., N. S., 70 (loss caused by failure to unload stock for feed and water); *Central of Georgia Ry. Co. v. Hall (Ga.)*, 19 R. R. R. 741, 42 Am. & Eng. R. Cas., N. S., 741; *Louisville & N. R. Co. v. Smitha (Ala.)*, 19 R. R. R. 775, 42 Am. & Eng. R. Cas., N. S., 775 (negligence of carrier's servants); *Illinois Cent. R. Co. v. Cane's Adm'x (Ky.)*, 19 R. R. R. 823, 42 Am. & Eng. R. Cas., N. S., 823 (under special contract making it the duty of shipper to unload horse, if agent of carrier is present and assisting in unloading it in an unsafe way, and the animal is thereby injured, the carrier is liable); *Nashville, etc., Ry. v. Stone & Haslett (Tenn.)*, 18 R. R. R. 88, 41 Am. & Eng. R. Cas., N. S., 88; *Eckert v. Pennsylvania R. Co. (Pa.)*, 18 R. R. R. 475, 41 Am. & Eng. R. Cas., N. S., 475; *Yazoo, etc., R. Co. v. Grant (Miss.)*, 18 R. R. R. 257, 41 Am. & Eng. R. Cas., N. S., 257; *Nevius v. Chicago, etc., Ry. Co. (Wis.)*, 18 R. R. R. 65, 41 Am. & Eng. R. Cas., N. S., 651 (failure to supply suitable cars); *Everett v. Norfolk & S. R. Co. (N. Car.)*, 18 R. R. R. 551, 41 Am. & Eng. R. Cas., N. S., 551; *Southern Ry. Co. v. Levy (Ala.)*, 17 R. R. R. 50, 40 Am. & Eng. R. Cas., N. S., 50; *Peerless Mfg. Co. v. New York, etc., R. R. (N. H.)*, 17 R. R. R. 13, 40 Am. & Eng. R. Cas., N. S., 13; *Russell v. Erie R. Co. (N. J.)*, 15 R. R. R. 699, 38 Am. & Eng. R. Cas., N. S., 699; *Georgia, etc., Ry. Co. v. Johnson, King & Co. (Ga.)*, 14 R. R. R. 398, 37 Am. & Eng. R. Cas., N. S., 398; *Ragsdale, Harper & Weathers v. Southern Ry. Co. (Ga.)*, 12 R. R. R. 120, 35 Am. & Eng. R. Cas., N. S., 120 (defects in car which had been examined by shipper of live stock); *Saunders v. Southern Ry. Co. (C. C. A.)*, 11 R. R. R. 596, 34 Am. & Eng. R. Cas., N. S., 596 (baggage); *Parker v. Atlantic, etc., R. Co. (N. Car.)*, 11 R. R. R. 675, 34 Am. & Eng. R. Cas., N. S., 675; *Paul v. Pennsylvania R. Co. (N. J.)*, 10 R. R. R. 586, 33 Am. & Eng. R. Cas., N. S., 586; *Bosley v. Baltimore & O. R. Co. (W. Va.)*, 10 R. R. R. 458, 33 Am. & Eng. R. Cas., N. S., 458.

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Action at law to recover damages growing out of the negligence of defendant in connection with a shipment of cattle. There was a verdict in favor of plaintiff, on which judgment was entered. Both parties appeal. The defendant will be denominated the appellant; its appeal being first in point of time. Reversed.

Shull, Farnsworth & Sammis, J. H. Hutchinson, and C. A. Plank, for appellant.

G. Klay and G. T. Hatley, for appellee.

BISHOP, J. We may first dispose of plaintiff's appeal. Defendant operates a line of railway from Chicago west across the states of Illinois and Iowa, crossing the Mississippi river at Savanna. Plaintiff resides at Rock Valley, a station on the line of defendant's railway in Sioux county, Iowa. On Monday, July 3, 1905, plaintiff delivered to defendant for shipment from Rock Valley to Chicago 243 head of cattle, and it is the contention made by him in pleading that the shipment contract entered into was oral in part. He says that it was orally agreed by defendant that said cattle should be transported by special train, "and, while it could not guarantee to transport said cattle in 28 hours, it would use every effort to do so, and to deliver said stock in Chicago in time for the market held on the second day after leaving Rock Valley;" that after said stock had been accepted by defendant, and loaded on cars, "the parties, for the purpose of enabling the persons in charge of said stock to prove their right to free transportation, reduced part of the oral agreement to writing," and a copy of the writing is attached. On its face the writing is designated as a "Limited Liability Live Stock Contract," and one of the provisions thereof is that "the company shall not be liable for injury or damage to said stock by or on account of the delay thereof during its transportation, and it does not agree to deliver said stock at destination at any specified time." According to the further allegation of the petition, the stock was not delivered in Chicago within 28 hours, or on the morning of the second day after shipment, and on this is predicated the claim for damages. The answer of defendant makes denial of the oral agreement pleaded, and it is alleged that the writing exhibited by plaintiff contains all the agreements between the parties respecting the shipment in question. On the trial plaintiff sought to make proof of the oral agreement pleaded, and, defendant objecting, he was not permitted to do so. The case was then tried and submitted to the jury, on the theory that writing evidences the contract of the parties. On the coming in of the verdict plaintiff did not complain thereof, as to the amount or otherwise, by motion for new trial, nor did he save an exception to the judgment entered thereon in his favor.

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In plaintiff's notice of appeal, it is stated that the appeal is "from the rulings and judgment of the district court," etc. In the brief it is said that the error relied on for reversal arose out of the refusal of the court to permit plaintiff to make proof of the oral agreement pleaded. Just what is intended by the appeal is not easy to determine. We cannot believe that plaintiff wants the judgment in his favor—of which he has not and does not complain as inadequate—reversed. And yet he says as much in presenting his appeal, while on defendant's appeal he strenuously insists that the judgment was right, and should be affirmed. Counsel does not point out to us how we may at one and the same time both reverse and affirm a judgment, and we confess our inability to meet the problem. It may be—and this seems most probable—that the appeal is expressive only of a desire that we rebuke the trial court for error in the ruling on evidence, and, having done this, that we stop short of any interference with the judgment. Respecting this, it is sufficient to say that no appeal lies from a ruling on evidence. Such can only be reviewed where the error inheres in the judgment, and the appeal is brought to secure a modification or reversal of such judgment. See Code, § 4101, and cases cited thereunder.

2. Coming now to a consideration of defendant's appeal, it is proper that we take note to begin with of the issue upon which the case was tried. The trial court, as we have seen, took the view that the contract rights of the parties were measured by the provisions of the writing signed by them at the time of shipment, and rejected the evidence brought forward by plaintiff to establish an oral agreement additional thereto. And, in disposing of the appeal, we are required to proceed upon the like theory, and accept of the action as one having reference back only to the written contract. It will be remembered that one of the provisions of such contract is that the defendant shall not be liable for damages caused by delay in transportation, nor shall it be held to any particular time for delivery. The petition alleges that 28 hours is a reasonable time in which to make the run from Rock Valley to Chicago, and that, had the run been so made, the cattle would have arrived at the stockyards in Chicago on the morning of July 5th in ample time for the market of that day. The allegation follows that defendant did not use proper effort to accomplish the shipment in said time; that "by reason thereof, at the expiration of 28 hours from leaving Rock Valley, said stock had only reached Savanna, * * * and under the provisions of the United States statutes said stock had to be there unloaded, fed, and watered, and kept for at least 5 hours;" that in consequence of all which plaintiff was not able to put his cattle on sale in Chicago until the market opening on the morning of the following day. The damages claimed are

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based upon an alleged decline in the market price, also, in the additional depreciation in the condition of the cattle caused by the delay. As we have seen, the defendant relies upon the written contract, and denies that the shipment was unreasonably or negligently delayed. At the close of all the evidence in the case, the defendant moved for an instructed verdict in its favor, on the ground, among others, that negligence on its part had not been shown. The motion was overruled. The like contention was presented by motion for new trial after verdict, and such motion was overruled. Out of these rulings arise the matter of error principally relied upon to reverse the judgment.

The rules of law applicable to the subject are well settled, and it will not be found amiss to take brief note thereof looking into the evidence. Where a railway company accepts live stock for shipment, it becomes its duty to transport the same with all reasonable dispatch to the point of destination. This is not only a rule of the common law, but in this state it is so provided by statute. Code, § 2116. Further, it is a matter of statute that the liability consequent in law upon a failure to properly perform the duty cannot be avoided or limited by any provision inserted in the shipment contract. Code, § 2074. So it is that where, as here, stock is accepted for shipment without any agreement in terms respecting the time of delivery at the place of destination, but with an agreement that the carrier shall not be responsible for damages arising out of any delay in shipment, the shipper is not debarred from a recovery if, in truth, the delay was unreasonable and hence negligent. As in all other cases where a right to damages is predicated on negligence, the proof must come from him who asserts the failure of duty.

Recurring now to the record before us, it appears that the cattle were loaded on cars at Rock Valley at about 6:30 o'clock in the evening. They were taken through on a regular stock train which was scheduled to arrive at Savanna, a division station, at 9:05 o'clock on the evening of the next day. In fact, the train reached the station 15 minutes late. It will thus be seen that substantially 27 hours were consumed in making the run. At Savanna the cattle were unloaded, fed, and watered and this in conformity with the federal statute, which provides that the cattle shall not be permitted to remain in cars longer than 28 hours without being unloaded, fed, watered, and allowed to rest at least 5 hours before being reloaded. The cattle in question were unloaded about 11 o'clock, fed and watered. Reloading, under the law, could not begin before 4 o'clock a. m., and it appears that at least an hour's time would be necessary to that process. The schedule time for stock trains from Savanna to the stockyards in Chicago was 8 hours. From this it becomes apparent that it was impossible for a train operated under the time

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schedule to make the run from Rock Valley to the stockyards in Chicago in 28 hours, or, stating the proposition in the other form, for a train leaving Rock Valley on Monday evening to reach the Chicago yards in time for Wednesday morning market. And from this it follows that, if negligence there was on the part of defendant, it consisted in operating its train under a time schedule unreasonably slow. And, in respect of this, there is no competent evidence in the record. We find nothing having possible bearing, except the testimony of several stockmen who say that in times past they had accompanied stock to Chicago, and the trip had been made in 28 hours or less. Cross-examination developed that, when trips had been made in that number of hours, it had been made by special train, and generally run on Sunday, when the tracks were comparatively clear. It would be contrary to all authority and against all reason to say that such testimony should be accepted as sufficient to convict a railway company of adopting for the movement of its trains a time schedule so far dominated by unreason, as that operation thereunder must be accepted as of itself constituting negligence.

We think the motion for a verdict should have been sustained. Having reached this conclusion, it is not necessary that we consider other questions made in argument. The judgment is reversed, and the case is ordered remanded for a new trial.

Reversed.

CHICAGO, I. & L. RY. CO. *v.* PRITCHARD.

(Supreme Court of Indiana, Dec. 21 1906.)

[79 N. E. Rep. 508.]

Railroads—Operation—Injury to Employee of Shipper—Question for Jury.—Where decedent, hearing some one shout "Stop the train," left his place where he was helping load a flat car with poles for shipment by his employer, and walked around the car to a point where he could see an approaching train, and was thrown upon a nearby track by the falling of poles caused by a defect in the car, and was killed by the train, it was for the jury to determine the proximate cause of the accident.

Same—Liability.*—Decedent was assisting in loading a flat car with poles for shipment by his employer, when some one nearby shouted an alarm to stop a train, whereupon he left his place and went around the car to a point where he could see the approaching train, and was thrown upon a nearby track by the falling of poles caused by a defect in the car, and was killed. Held that, if the defect and the failure of the company to see that the car was in proper condition when delivered to the shipper was the proximate cause of the accident, and decedent was standing at that point rightfully, the company was liable, though there was no privity of contract between the company and decedent.

Same—Presumptive Evidence.—Where decedent was assisting in loading a flat car with poles for shipment by his employer, and some one nearby shouted an alarm to stop an approaching train, and decedent left his place, and went around the car to a point where he could see the train, and while there was killed, the jury could presume, in the absence of evidence as to why he went around the car, that he did so through a sense of duty to assist in any emergency that might arise.

Same—Employee Going Beyond his Routine Duties—Trespassers.—Where decedent was assisting in loading a railway car for shipment by his employer, when some one nearby shouted an alarm to stop an approaching train, and decedent left his place and went around the car to a point where he could see the train, to render any

*For the authorities in this series on the subject of the care due from the railroad company to persons, other than passengers, at stations, depots, or railroad premises, on business, see foot-notes appended to *Klughertz v. Chicago, etc., Ry. Co.* (Minn.), 9 R. R. R. 339, 32 Am. & Eng. R. Cas., N. S., 339, where all those preceding it are collected; foot-notes appended to *Ladd v. New York, etc., R. Co.* (Mass.), 25 R. R. R. 709, 48 Am. & Eng. R. Cas., N. S., 709; foot-notes appended to *Atchison, etc., Ry. Co. v. McElroy* (Kan.), 25 R. R. R. 487, 48 Am. & Eng. R. Cas., N. S., 487; *Louisville & N. R. Co. v. Farris* (Ky.), 25 R. R. R. 347, 48 Am. & Eng. R. Cas., N. S., 347.

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assistance emergency might require, he was not a trespasser at that point.

Same—Engineer's Failure to Stop Train.†—Though one standing near a railway track may have been a trespasser, the company was liable for injuries occasioned by the failure of an engineer to stop a train in obedience to signals, though the engineer did not know why he was signaled to stop.

Appeal—Assignments of Error—Questions Presented.—The assignment as a ground for a new trial that the evidence was contrary to law only raises a question, as far as the Supreme Court is concerned, of whether the evidence supports the verdict, and that court is not authorized, in so determining, to consider facts specially found by the jury.

Appeal from Circuit Court, Clay County; Presley O. Colliver, Judge.

Action by Walter K. Pritchard, administrator, against the Chicago, Indianapolis & Louisville Railway Company. From a judgment for plaintiff, defendant appeals. Transferred from Appellate Court (78 N. E. 1044) under section 13,370, Burns' Ann. St. 1901. Affirmed.

E. C. Field, G. A. Knight, and H. R. Kurrie, for appellant.
S. A. Hays, Coffey & McGregor, and C. E. Akers, for appellee.

GILLET, J. Action for the negligent killing of appellee's decedent. There was a verdict and judgment for appellee. The testimony showed the following facts: One Bridges was engaged in the shipment, over appellant's railroad, from the town of Cloverdale, of elm poles of various sizes. Pursuant to his request, appellant placed a flat car on its siding, just east of its main track, in said town, for use in making one of said shipments. Decedent was a teamster in the employ of Bridges, being hired by the day, and a short time before the accident he drove up, on the east side of the car, with a load of poles; and, as it was his duty to do, began helping the other men in the work of loading. There were stakes on the west side of the car to keep the poles from rolling off. When the car was about one-half or two-thirds loaded, some one cried: "Flag the train down there!" or "Stop the train!" A passenger train from the south was due,

†See foot-notes appended to *Texas & P. Ry. Co. v. Modawell* (C. C. A.), 23 R. R. R. 345, 46 Am. & Eng. R. Cas., N. S., 345, foot-note appended to *Louisville & N. R. Co. v. Vanarsdell's Adm'r* (Ky.), 10 R. R. R. 1, 33 Am. & Eng. R. Cas., N. S., 1; foot-notes appended to *Teakle v. San Pedro, etc., R. Co.* (Utah), 25 R. R. R. 18, 48 Am. & Eng. R. Cas., N. S., 18; *Drown v. Northern Ohio Traction Co.* (Ohio), 25 R. R. R. 1, 48 Am. & Eng. R. Cas., N. S., 1; foot-notes appended to *Louisville Ry. Co. v. Edelen's Adm'r* (Ky.), 25 R. R. R. 691, 48 Am. & Eng. R. Cas., N. S., 691.

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and about that time whistled for the town. When the alarm was given, Bridges and one Akin ran down the track to signal the engineer, while the other men started toward the track to see what was the matter. Decedent and one of his associates went around the north end of the car, and, after passing it, the former took but a step to the south, and, while looking in that direction, the poles on the north end of the car rolled over on him, owing to the fact that some of the pockets which held the stakes gave way. The poles which fell on decedent did not kill him, but they threw him over on the main track, and he was unable to extricate himself, although aided by his companion. A short time afterwards the train came smashing into the poles, instantly killing decedent. Some one, it afterwards turned out, had observed that a part of the load was leaning towards the main track, and this gave rise to the alarm. The giving of it caused much excitement among the men. Bridges ran some 75 feet down the track, but Akin, passing him, succeeded in reaching a point some 40 or 50 feet beyond. As the two proceeded, they waved their hats to signal the engineer. The engineer answered these signals by two short blasts of the whistle. Bridges testified that he could see the train when it was from 1,500 to 2,000 feet away from him, and that engineer gave the answering signal after the train had run between 600 and 800 feet. There is some confusion in the testimony as to distances, and as to where the train was when the engineer answered the warnings. To a considerable extent the matter is illustrated by photographs in which is shown the situation of objects to which the witnesses made reference. According to the testimony, there was no apparent effort to check the speed. It was up grade for three-quarters of a mile in approaching Cloverdale from the south, and there was a considerable curve in the track immediately south of said town. The locomotive was working steam as it passed the men who had signaled it. The train was composed of three coaches and a baggage car. The poles had been down for some moments when the engineer gave the answering signal. An examination of the flat car, which was subsequently made, disclosed that the pockets gave way because of the absence of nuts on some of the bolts which were used to hold the pockets in place. Bridges had not examined the car, and the defects could only have been perceived by looking from behind the heavy timber through which the bolts passed. No objection is urged to the complaint. The first paragraph seems to be predicated, at least principally, on negligence in the furnishing of a defective car, while the remaining paragraph charges negligence in the failure of the engineer to stop the train after he was signaled.

The principal contention of counsel for appellant is that there was no evidence to support the verdict, and that the court erred

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in refusing certain instructions tendered by appellant, to the effect that there was no liability on account of the furnishing of a defective car, as there was no contract relation between appellant and decedent. In view of the refusal of said instructions, it is necessary to determine the validity of the theory of defense relative to the defective car. It is, of course, clear that in such a case as this there can be no recovery upon the contract, as decedent was not in privity therewith, and, as respects the common-law duty to exercise care, which may grow out of contractual undertakings, as well as other circumstances (*Flint & Walling Mfg. Co. v. Beckett* [at this term] 79 N. E. 503), it is also evident that in the sale or letting of property to others, some limitation must be put upon the obligation of the vendor or hirer to respond to third persons in tort, since the duty of inspection rests, at least primarily, upon the person who possesses or controls the property; and, if some limitation were not put on the responsibility of the vendor or lessor, the extent of liability, as was pointed out in *Winterbottom v. Wright*, 10 M. & W. 109, might be carried to an absurd length. There may, however, in some circumstances be a liability to third persons growing out of the furnishing of dangerous property and it is our task to ascertain whether, in view of the facts relative to the furnishing of the car, the assumption of said instructions was justifiable that the act of appellant in that particular did not constitute a tort as against decedent.

No consideration of the authorities relative to this subject would be at all adequate which did not hark back to *Heaven v. Pender*, L. R. 11 Q. B. 503. In that case a dock owner furnished, upon a consideration, a tackle for the painting of a ship, which was moored at its own dock. The plaintiff, who was a workman in the employ of a person who had contracted with the shipowner to paint the ship, was injured by reason of the fact that one of the ropes of the tackle was defective. The majority of the court were of the opinion that the dockowner was liable, on the ground that the plaintiff was injured in a work in which the defendant was interested, since it received compensation for permitting the work to be done at its dock, and for furnishing the tackle, and that therefore the plaintiff should be considered as on the premises by invitation. Brett, M. R. (afterwards Lord Esher), was of opinion that the case was one in which a duty should be implied by law, independently of contract. He declared that "whenever one person supplies goods or machinery, or the like, for the purpose of their being used by another person under such circumstances that every one of ordinary sense would, if he thought, recognize at once that unless he used ordinary care and skill with regard to the condition of the thing supplied or the mode of supplying it, there would be

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danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing. And for a neglect of such ordinary care or skill whereby injury happens, a legal liability arises to be enforced by an action for negligence. This includes the case of goods, etc., supplied to be used immediately by a particular person or persons or one of a class of persons, where it would be obvious to the person supplying, if he thought that the goods were in all probability to be used at once by such persons before a reasonable opportunity for discovering any defect which might exist, and where the thing supplied would be of such a nature that a neglect of ordinary care or skill as to its condition or the manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied and who was about to use it."

In *Elliott v. Hall*, L. R. 15 Q. B. D. 315, it was held that a colliery owner, who shipped coal by rail in a car leased by him to a firm, was liable to a servant of the latter, who was injured while unloading the car, owing to the existence of a worn pin, which constituted the fastening of a trap in the bottom of the car. Grove, J., said: "It was clearly part of the contract for the sale of the coal to the plaintiff's employers, that it should be conveyed in a truck to the buyers, and it must necessarily have been contemplated that, when it arrived at its destination, the truck would be unloaded by the buyers' servants. I think that it is plain that under these circumstances a duty arose on the part of the defendant towards the plaintiff. If vendors of goods forward them to the purchasers, and for that purpose supply a truck or other means of conveyance for the carriage of the goods, and the goods are necessarily to be unloaded from such means of conveyance by the purchaser's servants, it seems to me perfectly clear that there is a duty on the part of the vendors towards those persons who necessarily will have to unload or otherwise deal with the goods to see that the truck or other means of conveyance is in good condition and repair so as not to be dangerous to such persons."

In *Caledonian R. Co. v. Mulholland*, L. R. A. C. (1898) 216, Lord Shand significantly observed that the case before the court did not involve a trap, or an invitation to use a trap or a noxious instrument.

In *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124, 15 Am. Rep. 387, a millowner was held liable for the negligent killing of a workman in the employ of another, owing to the fall of a scaffold; it appearing that the scaffold was erected for the use of the workmen who were engaged under such contractor in performing work for the defendant, on its premises. The court,

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in distinguishing certain earlier cases, said: "This case is entirely different. At the time of the injury, the scaffold belonged to the defendant, had been erected by it, was in its possession, and was being used on its premises, with its permission, for the very purpose for which it had been furnished, and by the persons for whose use it had been provided." In the subsequent case of *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311, a scaffold builder, who had erected a scaffold for the use of a contractor in painting the interior of a dome, was held liable for the death of a servant of the latter, caused by a defect in the scaffold. Importance was attached in this case to the fact that the defect was not obvious, and the court expressed itself as of the opinion, in view of the fact that the defendant had undertaken to erect a first-class scaffold, that the contractor, who was not an expert, was justified in relying upon the judgment of the defendant without making an examination. In the course of the opinion the court, in referring to the relation which the act of the defendant bore to the injury, said: "A stronger case where misfortune to third persons, not parties to the contract would be a natural and necessary consequence of the builder's negligence, can hardly be supposed, nor is it easy to imagine a more apt illustration of a case where such negligence would be an act imminently dangerous to human life."

In *Roddy v. Missouri Pacific Railway Co.*, 104 Mo. 234, 15 S. W. 1112, 12 L. R. A. 746, 24 Am. St. Rep. 333, it was held that the plaintiff was entitled to go to the jury on the question of the defendant's negligence, it appearing that the plaintiff, the servant of the owner of a stone quarry, was injured by the act of the defendant in furnishing a defective car to the quarry owner, and that the defendant had built the side track on which the car was being used under an arrangement by which the defendant was to furnish cars as they were needed for the transportation of the stone. The basis of liability was placed on the ground that it was a matter of mutual interest and profit to the defendant and the owner of the quarry to provide means for the transportation of the stone to market.

It was held in *Skin v. Reutter*, 135 Mich. 57, 97 N. W. 152, 63 L. R. A. 743, 106 Am. St. Rep. 384, that the defendants therein were liable where they had knowingly sold hogs afflicted with a dangerous and infectious disease to a live stock dealer, who, without knowledge of such disease, had placed the hogs in a pen with plaintiff's hogs, which thereby contracted the disease and died.

Mr. Smith, in his work on Negligence, seems to approve of the principle enunciated by the Master of the Rolls in *Heaven v. Pender*, 11 Q. B. D. 506 (*Whittaker's Smith on Negligence*, 13). while *Shearman & Redfield* characterize his opinion in that case

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as masterly. 1 Negligence (5th Ed.) § 116. See, also, 19 Harvard Law Review, 372. It appears to us that, reading the general propositions which are found in said opinion in connection with the limitations which are found therein, it appears, at least in the main, that the opinion correctly declares the law. Of course, it is the occupier or controller, rather than the lessor, who in general must respond to third persons for defects in property (*Marrey v. Scott*, L. R. Q. B. D. (1899) 986; *Webb's Pollock on Torts* 629), but we are of opinion that the lessor may be liable for their injury by such means where it can be said that the property was imminently dangerous to such persons and the circumstances were such that they should have admonished the lessor that there was such a possibility of failure to discover and repair the defect that, as an ordinarily prudent man, duly mindful of his duty towards others, he should have been prompted to have put the property in proper condition before parting with it.

The case of *Daugherty v. Herzog*, 145 Ind. 255, 44 N. E. 457, 32 L. R. A. 837, 57 Am. St. Rep. 204, upon which counsel for appellant rely, is distinguishable from the case at bar, principally for the reason that the two years possession of the owner of the building, the falling of which gave rise to that action, was sufficient to make the prior negligence of the contractor the remote cause of the accident. This brings us to the question of proximate cause, viewed with reference to the omission of the shipper to examine the car. It is not enough that the furnishing of a defective car by the company was in the line of causation, or even that without carelessness on its part the accident would not have occurred. It does not follow, however, that the intervention of a responsible human agent, even if that agent was in a degree a negligent one, makes the original act the remote cause. Mr. Sutherland properly observes that: "The test is to be found, not in the number of intervening events or agents, but in their character and in the natural and probable connection between the wrong done and the injurious consequences." 1 Damages (3d Ed.) § 17. The primary act must have such a connection with the wrong that it stands in the relation of cause and effect, so that it can be said that it was the duty of the person committing such act to apprehend that injury might thereby occur to another. In this case the intervening cause was not a supervening cause; there was at the most on the part of the shipper only an omission to stay the injurious consequences of what had already been done. In these circumstances, if it can still be said that it was the duty of the company, in view of the imminence of the danger and the possibility that its dereliction would be overlooked by the shipper, to have apprehended that its act might lead to the injury of a third person and, as an ordinarily prudent person, to

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have guarded against it, then, within the modern authorities at least, its act was a proximate cause, since the case would be one in which there was an unbroken connection between the wrong and the injury. *Billman v. Indianapolis, etc.*, R. Co., 76 Ind. 166, 40 Am. Rep. 230; *Terre Haute, etc., R. Co. v. Buck*, 96 Ind. 346, 49 Am. Rep. 168; 1 Thompson, Commentaries on Negligence, §§ 52, 54-58, and cases cited. As stated by Shearman & Redfield on Negligence (§ 34): "If the negligent acts of two or more persons, all being culpable and responsible in law for their acts, do not concur in point of time, and the negligence of one only exposes the injured person to risk of injury in case the other should also be negligent, the liability of the person first in fault will depend upon the question whether the negligent act of the other was one which a man of ordinary experience and sagacity, acquainted with all the circumstances, could reasonably anticipate or not. If such a person could have anticipated that the intervening act of negligence might, in a natural and ordinary sequence, follow the original act of negligence, the person first in fault is not released from liability by reason of the intervening negligence of another."

Still pursuing the question of proximate cause, it is to be remembered, as between the company and the shipper, that the duty was upon the former to furnish a proper car (*Lake Erie, etc., R. Co. v. Holland*, 162 Ind. 406, 69 N. E. 138, 63 L. R. A. 948); that a considerable degree of reliance would naturally be placed on this fact (*Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311); that the defects could only have been discovered by a very critical examination; and that the car would be in the possession of the shipper but a brief time. Considering the peril to third persons which the company's act involved, it is evident that the car was an eminently dangerous thing, since it could only be conjectured, if the pockets gave way while it was loaded, in the business for which it was to be used, at what point along the entire limit of transit the poles would fall. There are at least two well-considered cases in which it has been decided that a railroad company turning a defective car belonging to it over to another company for transit may properly be charged with negligence on account of an injury to a servant of the latter company, irrespective of the question whether the receiving company was guilty of negligence in failing to examine the car. *Moon v. Northern Pacific R. Co.*, 46 Minn. 106, 48 N. W. 679, 24 Am. St. Rep. 194; *Pennsylvania R. Co. v. Snyder*, 55 Ohio St. 342, 45 N. E. 559, 60 Am. St. Rep. 700. It will be observed that in such a case as this the determination of what was the efficient cause, involving, as it does, subsidiary questions upon which the minds of men of ordinary intelligence might reasonably differ, must become, as the ultimate question of negligence

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may be, one to be submitted to the jury. *Davis v. Mercer Lumber Co.*, 164 Ind. 413, 73 N. E. 899; Thompson, Commentaries on Negligence, §§ 161-164. The matter of proximate cause, while somewhat difficult clearly to put before juries, has in it no element which calls for the scholastic subtlety of the schoolman; in most cases an application of the doctrine only requires, after instructions concerning such of the general principles as the case involves, that the jurors should apply their every day judgment, as practical men, to ascertain whether there has been a delinquency on the part of the defendant, uninterrupted by any supervening cause, that the act or omission ought justly to be held as an efficient cause of the wrong. It is our opinion that it was competent for the jury to find that appellant, as a lessor, was guilty of a negligent omission as to decedent, if he was rightfully where he was at the time that he was knocked down by the poles, and, a fortiori, if he was, appellant's duty to him becomes very clear, since it may be asserted on the ground that, having gone where he did under an implied invitation, appellant directly owed him the duty to exercise ordinary care to keep the premises safe. *Baltimore, etc., R. Co. v. Slaughter* (at last term) 79 N. E. 186, and cases cited; *Heaven v. Pender, supra*.

It is the contention of counsel for appellant that decedent was wrongfully on the east side of the car. The instructions refused which we are now considering in terms deny to appellee all right of recovery, on the ground that decedent was not in privity with the original contract. As we have seen, this theory was erroneous if there was any evidence from which the jury might have based a conclusion that a duty was owing to decedent at the place in which he was when the poles rolled on him. We may also question whether appellant was entitled, by said instructions, to raise the question of a particular duty in this circuitous way, but, without deciding the latter point, we proceed to a consideration of the inferences which the jury had a right to indulge concerning the act of decedent. It is true that the evidence does not directly disclose why he went to the east side of the car, but it must be remembered that he was a servant, and that obedience is due from such a one. The call to stop the train, wherever it came from, naturally suggested that the danger might have something to do with the car which appellant was helping to load for his master. While it may be that decedent went where he did out of a prompting which was not un-mixed with curiosity, yet it is difficult, in view of the circumstances, to resist the conclusion that he was moved by his plain duty to be on hand should the emergency, whatever it was, require. We are of opinion that in the free logic, which we have had occasion to observe that a jury may exercise (*McCarty v.*

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State ex rel., 162 Ind. 218, 70 N. E. 131), it was competent for the jury to conclude that decedent was moved to go where he did in part at least, out of a prompting of duty. While juries are not authorized to indulge in mere conjectures, yet it is to be remembered that there would be many a bridgeless chasm in subjective inquiries were courts and juries not authorized to act on probabilities. "Probability," says Locke, "being to supply the defect of our knowledge, and to guide us when that fails, is always conversant about propositions whereof we have no certainty, but only some inducements to receive them for true," and he first mentions as a ground of presumption "the conformity of anything with our own knowledge, observation, and experience." Locke on the Understanding, book 4, c. 15, and see Ram on Facts, 118 et seq. Presumptions of fact are but conclusions drawn from particular circumstances, the connection between them and the sought for fact having received such a sanction in experience as to have become recognized as justifying the assumption. 1 Starkie on Evidence, p. 78; Sutphen v. Cushman, 85 Ill. 186, 201. While the purpose of decedent to go to the place where he was killed for some lawful purpose cannot be said to belong to the recognized presumptions of fact, unless it be upon the theory that it should be presumed that he did not intend to go beyond his legal right (Lawson Law of Presumptive Evidence, 336; Louisville, etc., R. Co. v. Thompson, 107 Ind. 442, 8 N. E. 18; 9 N. E. 357; 57 Am. Rep. 120), yet here the tendency of the evidence of the facts which induced his action to prove that he was moved to act as he did by the purpose which, as we have sought to show, would naturally actuate a man in the same circumstances is quite as strong as if the case could be assigned to one of the many established presumptions of facts. The dynamics of evidence of facts to induce a presumption of the existence of some further fact must depend upon the tendency of the evidence to persuade the judgment. The degrees of persuasion as pointed out by Bentham (1 Rationale Judicial Evidence, 71 et seq.), are infinite, and in the absence of countervailing evidence judges ought to be slow to interpose their judgment as against the conclusion of the jury where it can really be said that the facts proved have such a close and natural connection with the fact sought, when judged in the light of experience, as fairly to be calculated to be persuasive of its existence. The state of facts established in this case is not such as to create a violent presumption of the existence of the fact under inquiry. Such a presumption is said to be equivalent to full proof, but the facts, in our judgment, afford a sufficient basis on which to rest a probable presumption, which it has been observed "hath also its due weight." 1 Bentham, Rationale Judicial Evidence, 96. Besides, appellant does

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not occupy a very benign attitude in making the defense that decedent was a trespasser, since his trespass, if any, was only technical, and this being true, and there being evidence on which to found a serious claim that the presumption of right conduct should be drawn, we are of opinion that the case is within what Starkie states is the general rule, "that whenever there is evidence on which a jury has founded a presumption according to the justice of the case, the courts will not grant a new trial."

1 Starkie on Evidence, p. 754.

Assuming the fact above discussed in appellee's favor, the question arises as to the extent of the right of decedent in the particular circumstances. While it is true that his general work about the car was in assisting in loading the logs, yet the master, or those whom he might designate, was authorized to go on the other side of the car for any necessary purpose, and in the case of an emergency—one of those occasions which now and then occur in the practical affairs of life, when it is the business of men, and particularly of servants, to be on hand, leaving inquiry as to the necessity therefor to the future—we are of opinion that the courts, dealing with the law as a practical science and applying it to such a case as this, ought not to scale down the servant's duties to the ordinary routine of his work. As was said of the rights of a servant, in *Barry v. Hannibal, etc., R. Co.*, 98 Mo. 62, 11 S. W. 308, 14 Am. St. Rep. 610: "In case of emergency, he may of his own volition step outside of the line of his usual duties. If the departure be such only as the necessities of the case fairly and reasonably call for, keeping in view the character of the work which the servant had contracted to perform, then such departure will not of itself defeat a recovery for damages in case of his injury." As it would have been proper for the master to have contracted with any of his employees to perform any necessary work about the car, so, in an extraordinary situation, which called for the servant to act on his own initiative, it ought not to be for the company to assert that he was a trespasser merely because he was not at the place of his routine employment, the fact being that he was not beyond such limits as the master might direct him to go.

The fifth, sixth, seventh, eight, and fourteenth instructions tendered by appellant related to the conduct of decedent in going where he did, and were to the effect that in the circumstances therein hypothetically stated there should be a verdict for the defendant. This brings us to the question whether, granting that decedent was technically a trespasser, or was guilty of contributory negligence, his administrator was entitled to a verdict, in the event that the jury should find that the train could and should have been stopped after the engineer observed the signals of Bridges and Akin. By this we refer to the doctrine of

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last clear chance, under which the negligence of a defendant being the proximate cause, or, as it might be expressed, the supervening cause, the prior conduct of the other party is regarded merely as a remote cause. See Indianapolis, etc., Co. v. Kidd, 79 N. E. 347 at (this term); 1 Street, Foundations of Legal Liability, p. 156, and monographic note in 55 L. R. A. 415. As was said in Isbell v. New York, etc., R. Co., 27 Conn. 404, 71 Am. Dec. 78: "A remote fault of one party does not, of course, dispense with care in the other. It may even make it more necessary and important, if thereby a calamitous injury can be avoided, or an unavoidable calamity essentially mitigated. Common justice and common humanity demand this, and it is no answer for the neglect of it to say that the complainant was first in the wrong, since inattention and accidents are to a greater or less extent incident to human affairs. Preventive remedies must, therefore, always be proportionate to the case in its particular circumstances—to the imminency of the danger, the evil to be avoided, and the means at hand of avoiding it. And herein is no novel or strange doctrine of the law; it is as old as the moral law itself, and is laid down in the earliest books on jurisprudence."

It is stated by Shearman & Redfield that "the plaintiff should recover, notwithstanding his own negligence exposed him to the risk of injury, if the injury of which he complains was more immediately caused by the omission of the defendant, after having such notice of the plaintiff's danger as would put a prudent man upon his guard, to use ordinary care for the purpose of avoiding such injury. It is not necessary that the defendant should actually know of the danger to which the plaintiff is exposed. It is enough if, having sufficient notice to put a prudent man on the alert, he does not take such precautions as a prudent man would take under similar notice." 1 Negligence, § 99. The following are illustrative cases, holding that a railroad company may be liable for a failure of the engineer to stop after notice of danger, although he did not at the time know precisely the nature of the danger ahead. Seaboard, etc., R. Co. v. Joyner, 92 Va. 354, 23 S. E. 773; Meeks v. Southern Pacific R. Co., 56 Cal. 513, 38 Am. Rep. 67; Bullock v. Wilmington, etc., R. Co., 105 N. C. 180, 10 S. E. 988; Donahoe v. Wabash, etc., R. Co., 83 Mo. 543. So far as the act of decedent was concerned, the immediate consequence thereof was that the poles rolled on him; thereafter he ceased to be an actor in the affair. The case, therefore, does not appear to be one of contemporaneous negligence or wrongdoing. As to the conduct of appellant's engineer, the signals of the men who were running up the track meant that there was danger ahead; and, even if he could not appreciate its precise form, it was wholly competent for the jury to conclude

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that the circumstances called on him to stop, if he could reasonably do so without injury to his train and passengers, and for a negligent failure in that particular the company should be held liable. Doubtless he did not appreciate that a man was beneath the poles, and while in some circumstances the indications of danger may go to the question as to the duty to exercise care, yet here the evidence of some kind of danger which might involve others pressed too hard upon the mind of the engineer to authorize us to say that he was not negligent because he could not appreciate the concrete harm. It is stated by a leading writer that "It is not enough if an ordinarily prudent person should be able to see danger or harm of some sort ahead. Harm in the abstract, not harm in the concrete, is the idea." 1 Street, Foundations of Legal Liability, 104. And see, also, *Coy v. Indianapolis Gas. Co.*, 146 Ind. 655, 46 N. E. 17, 36 L. R. A. 535; *Donahoe v. Wabash, etc., R. Co.*, *supra*. In the latter case, which was somewhat analogous to this in its facts, the court seemed disposed to treat the question as one of law, since it quoted, with apparent approval, the following: "When there is reason to apprehend that the track may not be clear, notwithstanding the right of the company to have it clear, persons operating a train cannot act upon the presumption that the track is clear, without being responsible for the consequences."

As the verdict was general, we must assume that the jury found for appellee on both paragraphs of the complaint. The question as to whether appellant was entitled to judgment on the interrogatories has not been pressed by its counsel, but it certainly cannot be said that the answers to interrogatories were necessarily in conflict with the verdict to the extent that it was based on the second paragraph of the complaint. In this view, the motion for judgment was properly overruled. The assignment of a ground for a new trial that the evidence was contrary to law only raises a question, at least so far as this court is concerned, of whether the evidence supported the verdict, and we are not authorized in so determining to consider the facts specially found by the jury. *Cleveland, etc., R. Co. v. Miller*, 165 Ind. 381, 74 N. E. 509.

It appears to us that the evidence was sufficient to warrant a finding on each paragraph of the complaint, and as there was no intervening error the judgment must be affirmed.

It is so ordered.

EBERTS v. DETROIT, MT. C. & M. C. RY.

(Supreme Court of Michigan, Feb. 15, 1908.)

[115 N. E. Rep. 43.]

Carriers—Injury to Passenger—Consideration for Carriage.*—Where plaintiff's place of employment as a railroad car inspector was changed to a town some distance from his home, and at the time of the change he was informed that his wages would be the same, but that he would be furnished free transportation between his home and his place of employment, such facts justified an inference that the passbook was a part of the consideration for his services, and that the carriage was not gratuitous.

Same—Negligence—Exemption from Liability.†—Where transportation of a railroad employee from his home to his place of employment was not gratuitous but a part of his compensation, he was not bound by a provision of his passbook attempting to relieve the carrier from liability for injuries resulting from the negligence of the operatives of its cars.

Writ of Error—Objections—Waiver.—Under Supreme Court rule 40 (68 N. W. viii), requiring appellant to state in his brief the "questions involved, and to point out at least in what it is claimed the error consists," questions not argued or suggested in the brief of either party will not be reviewed.

Witnesses—Examination—Recall—Change of Testimony.—In an action for injuries to plaintiff while traveling on a passbook, he testified on direct examination that when his employment was changed from his home town he was to have the same wages; that there was nothing said in regard to transportation over the road nor about a passbook; that he never had any conversation with any officer of the company, but used the passbook, riding backward and forward to work, etc. After defendant had rested, plaintiff was recalled, and

*See *Enos v. Rhode Island Sub. Ry. Co.* (R. I.), 24 R. R. R. 612, 47 Am. & Eng. R. Cas., N. S., 612; foot-notes appended to *Vassor v. Atlantic Coast Line R. Co.* (N. Car.), 25 R. R. R. 629, 48 Am. & Eng. R. Cas., N. S., 629.

†For the authorities in this series on the power of a carrier of passengers to exempt itself from liability or limits its liability, see foot-notes appended to *Feldschneider v. Chicago, etc., Ry. Co.* (Wis.), 12 R. R. R. 737, 35 Am. & Eng. R. Cas., N. S., 737, where all the preceding ones are collected; foot-note appended to *Marshall v. Nashville Ry. & L. Co.* (Tenn.), 25 R. R. R. 151, 48 Am. & Eng. R. Cas., N. S., 151; foot-notes appended to *St. Louis, etc., Ry. Co. v. Pitcock* (Ark.), 25 R. R. R. 79, 48 Am. & Eng. R. Cas., N. S., 79; foot-notes appended to *Pittsburg, etc., Ry. Co. v. Higgs* (Ind.), 24 R. R. R. 201, 47 Am. & Eng. R. Cas., N. S., 201; foot-notes appended to *Pierson v. Illinois Cent. R. Co.* (Mich.), 24 R. R. R. 591, 47 Am. & Eng. R. Cas., N. S., 591; *Lake Shore, etc., Ry. Co. v. Teeters* (Ind.), 24 R. R. R. 36, 47 Am. & Eng. R. Cas., N. S., 36.

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testified that, when he was directed to work away from home, defendant's foreman, who gave the direction, stated that he would give plaintiff a night job at \$1.75 a day and tickets, and that the tickets would be good to his place of employment and back for the same wages. Held, that plaintiff's change in testimony was not radical, and that the court therefore did not err in permitting it.

Error to Circuit Court, Macomb County; Harvey Tappan, Judge.

Action by Charles Eberts against the Detroit, Mt. Clemens & Marine City Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

Defendant is a common carrier of passengers upon an electric railway between the city of Mt. Clemens, Macomb county, and the city of Marine City, St. Clair county. In the lower court plaintiff recovered a verdict and judgment for personal injuries sustained by him while riding on said railway. His injuries were caused by a collision between the car upon which he was riding—one of defendant's regular passenger cars—and another car operated by defendant. The collision was caused by the negligence of defendant's employees managing said cars. At the time of his injury, and for about a year prior thereto, plaintiff was employed by defendant as night car inspector at its barn in Marine City. He had finished his night's work, and was being carried to his home in Mt. Clemens upon a ticket taken from a passbook furnished by defendant. This passbook was marked "Employee's Passbook. Good only when presented by Charles Eberts." It contained 100 tickets, each entitling plaintiff to ride between any two points on defendant's railway. Upon the book was printed the following notice: "The person accepting this passbook, in consideration thereof, assumes all risk of accident, and expressly agrees that the company shall not be liable under any circumstances, whether for negligence of their agents or otherwise, for any injury to the person, or for any loss or injury to the property of the passenger using it." Plaintiff knew of this notice, and used the tickets with full understanding of its terms. Is this agreement valid? That is the only question in this case.

Plaintiff testified that he resides at Mt. Clemens and has resided there all his life; that when he first entered defendant's employ he worked at Mt. Clemens, and that shortly thereafter he was told that he would be transferred to Marine City. "Q. What was said about your wages? A. I was supposed to have the same wages—\$1.75 per day." He also testified that at this time he received a passbook precisely like the one above mentioned; that nothing was said "in regard to having transportation on the road;" that nothing was said "about the passbook;" that he never had any conversation about the passbook with any

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officer of the company that he used the passbook "riding backwards and forward to work" between Marine City and Mt. Clemens and elsewhere as occasion demanded; that when he used all the tickets in a passbook he turned in the cover and received a new one, and that the one upon which he was riding at the time of his injury was thus received. This was the situation of plaintiff's case at the time he rested. Defendant thereupon moved for a verdict upon the ground that, as plaintiff was being carried gratuitously, his agreement was valid, and prevented recovery. This motion was denied, and defendant excepted. Defendant thereupon introduced certain testimony—the details of which are unimportant—and rested. Plaintiff was recalled, and testified that when he was directed to work at Marine City defendant's foreman who gave the direction said: "He would give me a night job; \$1.75 a day, and tickets to go home and for use to go to work on. * * * I did ask him if that book was good to Marine City and back for my same wages, and he said 'Yes.' " The trial court instructed the jury to render a verdict in plaintiff's favor, leaving to them only the question of damages.

Argued before MCALVAY, C. J., and CARPENTER, MONTGOMERY, OSTRANDER, and HOOKER, JJ.

James G. Tucker (Brennan, Donnelly & Van De Mark, of counsel), for appellant.

Franz C. Kuhn and John A. Weeks, for appellee.

CARPENTER, J. (after stating the facts as above). The principal complaint of defendant is that the court erred in refusing to direct a verdict in its favor when plaintiff first rested his case. The ground of this complaint is that the testimony of plaintiff proved that he was being carried gratuitously, and it is insisted that a common carrier of passengers may lawfully contract to exempt itself from liability for the negligent injury of a passenger being carried gratuitously. Does the testimony of plaintiff prove that he was being carried gratuitously? Defendant's argument that it does rests in part upon the assumption that the furnishing of the passbook had no relation to the plaintiff's transfer from Mt. Clemens to Marine City. We think this assumption unfounded. We infer from plaintiff's testimony that the passbook was given him at the time the order of transfer was communicated. We summarize plaintiff's testimony as follows: While in defendant's employ in Mt. Clemens where he resided, he was ordered to work at Marine City, a town some distance away. His wages were to remain the same, but he was given a passbook which enabled him to ride upon defendant's railway between his home and his place of work, and he used said passbook for that purpose. We think from this testimony that it may be inferred that the passbook was a part of the con-

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sideration for plaintiff's services. From what was said and what was done it may justly be inferred that both parties understood that, as a consideration for his services at Marine City, plaintiff should receive wages of \$1.75 per day and transportation between his home and the place he worked. Under this view of the testimony, the passbook was not furnished gratuitously, and plaintiff was not being carried gratuitously. *Doyle v. Pittsburg Ry. Co.*, 166 Mass. 492, 44 N. E. 611, 33 L. R. A. 844, 55 Am. St. Rep. 417, is a similar case, and the decision is in harmony with these views. It was also held in that case—and this proposition I understand to be conceded by defendant—that the transportation not being gratuitous, a common carrier of passengers has no lawful right to enter into a contract exempting itself from liability for the negligence of its employees. See *Weaver v. Ann Arbor Ry.*, 139 Mich. 590, 102 N. W. 1037.

It is said in appellant's brief that in any event the trial court erred in not submitting to the jury the question of plaintiff's being carried gratuitously. This complaint is not argued, nor the ground upon which it is based stated in appellant's brief. We cannot say that this issue should have been submitted to the jury unless we decide either that the jury (a) had a right to discredit plaintiff's testimony, or (b) that they had a right to infer from that testimony that he was being carried gratuitously. Neither of these questions are argued, or even suggested, in appellant's brief. Neither are they argued in the brief of appellee. Under these circumstances, is it our duty to look through the record and decide them? If it is, and if in consequence we reverse the judgment, we reverse it on a proposition upon which the appellee had no opportunity of being heard. We must therefore decline to consider them. It was appellant's duty to state in his brief the "questions involved" (Supreme Court rule 40 [68 N. W. viii]), and "to point out at least in what it is claimed the error consists." *Mason v. Patrick*, 100 Mich. 577, 59 N. W. 239.

It is also contended that error was committed in permitting plaintiff when he was recalled, after defendant rested, to change his testimony in the manner he did. This contention rests upon the assumption that this change was radical. Under our view of his former testimony, as already appears, it was not radical. It amounted to this: that the parties expressly agreed to a provision which would otherwise be implied. We do not think the ruling under consideration erroneous.

We do not consider the proposition—elaborately and ably argued in appellant's brief—that a carrier of passengers may lawfully contract that it shall not be liable for the negligent injury of a passenger carried gratuitously. As shown by this opinion, that proposition is not presented in this case, and it would therefore be improper for us to decide it.

The judgment is affirmed.

MARCUS K. BITTERMAN, Julius Mehlig, and Charles T. Kelsko,
 Petitioners, *v.* LOUISVILLE & NASHVILLE RAILROAD.
 COMPANY.

[28 Sup. Ct. Rep. 91.]

Carriers—Excursion or Round-Trip Tickets.*—A carrier may sell nontransferable round-trip, reduced-rate excursion tickets, and the condition of nontransferability and forfeiture embodied therein is not only binding upon the original purchaser, but upon anyone who acquires such a ticket and attempts to use the same in violation of its terms.

Interstate Carriers—Excursion or Round-Trip Tickets.—The express recognition in the act to regulate commerce of the power of carriers engaged in interstate commerce to issue nontransferable reduced-rate excursion tickets, when considered with the restrictions embodied in the act concerning equality of rates, and with the prohibition against preferences, must be regarded as charging the carrier with the duty of exercising due diligence to prevent the use of such tickets by other than the original purchasers, and hence causes the nontransferable clause to be operative and effective against anyone who wrongfully attempts to use such tickets.

Case—Inducting Breach of Contract—Ticket Brokerage.†—Carrying on the business of purchasing and selling nontransferable reduced-rate excursion railroad tickets for profit, to the injury of the railroad company issuing such tickets, is an actionable wrong, although actual malice in the sense of personal ill will may not exist.

Pleading—Admission by Failure to Plead to Jurisdiction.—Proof in support of an averment that the requisite jurisdictional amount is involved need not be offered where the defendant does not formally plead to the jurisdiction.

Courts—Jurisdictional Amount—When Not Colorable or Fictitious.—The jurisdictional amount averred in a bill filed in a federal circuit court to enjoin ticket brokers from dealing in nontransferable reduced-rate excursion tickets cannot be deemed colorable and fictitious when considered with the averments as to the large number of such tickets issued, the recurring occasions for their issuance, the magnitude of the wrong dealings by the defendants, the cost and risk incurred by the steps necessary to prevent their wrongful use, the injurious effect upon the revenue of the complaining railroad company, and the operation of the illegal dealing in such tickets upon the

*See foot-note appended to *Schubach v. McDonald* (Mo.), 11 R. R. 613, 34 Am. & Eng. R. Cas., N. S., 613.

†For the authorities in this series on the subject of ticket scalping and the sale of railroad tickets by unauthorized persons, see foot-notes appended to *State v. Thompson* (Ore.), 24 R. R. R. 150, 47 Am. & Eng. R. Cas., N. S., 150.

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company's right to issue them in the future, coupled with the admissions in the answer that defendants had not only in the past dealt in such tickets, but intended to carry on the business as to all future issues.

Injunction—Adequate Remedy at Law.—Injunctive relief against ticket brokers dealing in nontransferable reduced-rate excursion tickets will not be denied on the ground that an adequate remedy at law exists, where such brokers admit past dealings, and avow their purpose to continue the practice, and where the number of such tickets issued is large, the risk to be incurred by the steps necessary to prevent their wrongful use is considerable, and numerous suits will be necessitated if redress is sought at law.

Pleading—Multifariousness.—An objection of multifariousness based on misjoinder of parties and causes of action does not lie against a bill to enjoin ticket brokers from dealing in nontransferable reduced-rate excursion tickets, where the acts complained of as to each defendant were of a like character, their operation and effect upon the rights of the complaining carrier were identical, the relief sought against each defendant being the same, and the defenses which might be interposed being common to each defendant, and involving like legal questions.

Injunction—Extent of Relief—Future Acts.—Injunctive relief against ticket brokers unlawfully dealing in nontransferable reduced-rate excursion tickets may extend to the restraining of like dealings as to similar tickets which may be issued in the future.

Argued November 4, 1907. Decided December 2, 1907.

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review a decree remanding to the Circuit Court for the Eastern District of Louisiana a suit to restrain ticket brokers from dealing in nontransferable reduced-rate excursion tickets, with directions to enter a decree enjoining the defendants generally from dealing in such tickets, whether already issued or thereafter to be issued. Affirmed.

See same case below, 75 C. C. A. 192, 144 Fed. 34.

Statement by Mr. Justice White:

Upon a bill filed on behalf of the Louisville & Nashville Railroad Company, the circuit court of the United States for the eastern district of Louisiana entered a decree perpetually enjoining the petitioners herein and four other ticket brokers, engaged in business in the city of New Orleans, from dealing in nontransferable round-trip tickets issued at reduced rates for passage over the lines of railway of the complainant on account of the United Confederate Veterans' Reunion and the Mardi Gras celebration held in the city of New Orleans in the years 1903 and 1904, respectively. On an appeal prosecuted by the railroad

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company, complaining of the limited relief awarded, the circuit court of appeals held that the defendants should also be enjoined generally from dealing in nontransferable round-trip reduced-rate tickets whenever issued by the complainant, and ordered the cause to be remanded to the circuit court with directions to enter a decree in accordance with the views expressed in the opinion. (75 C. C. A. 192, 144 Fed. 34.) A writ of certiorari was thereupon allowed.

We summarize the averments of the complaint and answer. It was averred in the bill that complainant was a Kentucky corporation, operating about 3,000 miles of railway for the carriage of passengers, baggage, mail, express, and freight, its lines of road extending from New Orleans through various states, and making connections by which it reached all railroad stations in the United States, Canada, and Mexico. The seven persons named as defendants were averred to be citizens and residents of Louisiana, each engaged in the city of New Orleans as a ticket broker or scalper in the business of buying and selling the unused return portions of railroad passenger tickets, especially excursion or special-rate tickets issued on occasions of fairs, expositions, conventions, and the like. It was further averred that the defendants were joined in the bill, "because their business and transactions complained of are in act, purpose, and effect identical, and in order to prevent a multiplicity of suits, the same relief being sought as to each and all of them."

Six articles or paragraphs of the bill related to an approaching reunion of United Confederate Veterans to be held in the city of New Orleans, which it was expected would necessitate the transportation by the railroads entering New Orleans of 100,000 visitors, one fourth of which number would pass over the lines of railway of the complainant. A necessity was alleged to exist for special reduced rates of fare to secure a large attendance at such reunion, and it was averred that a rate of 1 cent a mile, one-third the regular rate, had been agreed upon for nontransferable round-trip, reduced-rate tickets, which were to be issued for the occasion, and it was stated "that among the conditions on the face of said ticket, which ticket contract is signed by the original purchaser and the company, is one that said ticket is nontransferable, and, if presented by any other than the original purchaser, who is required to sign the same at date of purchase, it will not be honored, but will be forfeited, and any agent or conductor of any of the lines over which it reads shall have the right to take up and cancel the entire ticket." And for various alleged reasons, based mainly upon the large number of expected purchasers, it was averred that the return portion of each ticket was not required to be signed by the orig-

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inal purchaser or presented to an agent of the complainant in the city of New Orleans for the purpose of the identification of the holder as the purchaser of the ticket.

It was averred that each defendant was accustomed to buy and sell the return coupons of nontransferable tickets, for the express purpose, and no other, of putting them in the hands of purchasers; to be fraudulently used for passage on the trains of complainant, and it was further averred that the defendants intended in like manner to fraudulently deal in the return portion of the tickets about to be issued for the reunion in question, and that complainant would sustain irreparable injury, for which it would have no adequate remedy at law, unless it was protected from such wrongful acts. It was further averred that unless relief was given the complainant would be compelled to abandon the making of reduced rates for conventions or other assemblies to be held in the city of New Orleans. Averments were also made as to the additional burden which would be cast upon complainant's conductors and train collectors by reason of the practice complained of, the danger which would arise of a multiplicity of suits for damages by reason of errors of such employees in endeavoring to prevent the fraudulent use of such tickets, and it was averred that it would be impossible, in many instances, to discover the persons who were wrongfully traveling upon the tickets and who were bound to pay the lawful and reasonable one-way rate for their transportation. The impossibility of securing evidence establishing the facts as to said fraud, the necessity, if such evidence could be obtained, of bringing a multiplicity of suits if a remedy at law was availed of, and the impracticability of estimating in dollars and cents the injury to its business, was set forth as making the remedy at law inadequate, and in addition it was charged that the defendants were financially irresponsible. The existence was also averred of various ticket brokers' associations, the members of which acted in concert. It was averred that a large part of the stock in trade of all ticket brokers and scalpers was the disposal of nontransferable railroad tickets, and it was further averred that ticket brokers and scalpers usually sought to avoid injunctions prohibiting the dealing in such tickets by assigning their business to some other ticket broker not named in the order, and it was averred that, in order to afford complete and effective relief, "the restraining injunctive orders should be broad enough to include all who knowingly do what the order of court prohibits defendants from doing, or who aid or abet defendants in violating the injunction or in defeating the objects and purposes thereof." Finally, it was alleged that the amount involved in the controversy exceeded, exclusive of interest and costs, the sum of \$5,000, and that the value of the business which was sought to be protected,

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and the rights which the complainant asked to have recognized and enforced, exceeded, in the case of each defendant, the sum of \$5,000, exclusive of interest and costs.

In addition to asking a temporary restraining order the bill prayed that defendants, their agents, etc., "and all other persons whomsoever, though not named herein, from and after the time when they severally have knowledge of the entry of the restraining order and the existence of the injunction herein," should be perpetually enjoined "from buying, selling, dealing in, or soliciting the purchase or sale of, any ticket or tickets or the return coupons or unused portions thereof issued by orator or by any other railroad company for use over orator's lines of railway or any part of them, which, by the terms thereof, are nontransferable, or from soliciting, advertising, encouraging, or procuring any person other than the original purchaser of such tickets, to use or attempt to use said tickets for passage on any train or trains of orator, especially including the nontransferable round-trip tickets issued for use on the occasion of the United Confederate Veterans' Reunion at New Orleans in May, 1903."

Of the seven persons made defendants, three only appeared and answered, *viz.*, Marcus K. Bitterman, Julius Mehlig, and Charles T. Kelsko, the petitioners in this court, on whose behalf a joint and several answer was filed.

The averments of the bill in respect to the citizenship of the complainant and the character and extent of its railway business was admitted. It was also admitted that the answering defendants were citizens and residents of Louisiana, but it was averred that they were each separately engaged in the ticket brokerage business, duly licensed to conduct such business by the state of Louisiana and the city of New Orleans, and it was expressly denied that the business operations and transactions of all the defendants named in the bill were in act, purpose, and effect identical. So also the answer admitted the averments of the bill in respect to the proposed reunion, the large attendance expected, the issue of reduced-rate, nontransferable tickets, and the necessity therefor, and the impracticability of requiring the signing of the return portion of each ticket by the purchaser.

It was admitted in the answer that the tickets usually issued by complainant and its connections when making reduced rates as to excursion tickets purported to be nontransferable and upon condition that, if presented by other than the original purchaser, who was supposed to sign the same at the date of purchase, it would not be honored, but would be forfeited, and that any agent or conductor should have the right to take up and cancel such ticket if presented for passage. In various paragraphs these restrictions or conditions were assailed as impracticable, unenforceable, and unlawful, and without consideration, and it was averred

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that the conditions were never enforced, and that the tickets were issued and bought with that understanding, and that no damage was caused to complainant by a person other than the original purchaser of a nontransferable reduced-rate ticket, traveling upon the return portion of such ticket, and that no loss or damage could be caused complainant by reason of the expected dealing by defendants in the reunion tickets referred to in the bill.

It was not only admitted in the answer that the answering defendants had in the past dealt in nontransferable railroad tickets issued by the complainant, but it was expressly declared to be their intention to continue the practice, particularly in respects to the tickets issued on account of the approaching reunion, and coupled with such averment it was asserted that no fraud would be committed or was intended in respect to the dealing in such tickets. We insert in the margin,† portions of the answer relating to such admissions.

It was denied that the answering defendants were insolvent, but, on the contrary, it was averred that each was able to pay

†9.

Respondents further admit that, in accordance with the general custom of the trade, they separately buy and sell the return coupons of railway tickets, whether the same are stamped "nontransferable" or not, for the reason that the term "nontransferable" does not import any practical or legal meaning in the business, according to the common understanding of the railways themselves, the ticket brokers, and the traveling public to whom said tickets are issued, who freely sell them to brokers, who, in turn, sell them to other persons desiring to use said tickets for transportation, when genuine and bona fide.

Respondents do not deny that the complainant, on occasions of Mardi Gras festivals in the city of New Orleans, have joined in the issuing of reduced rates and the putting out of said so-called "non-transferable" tickets, but, as above set out, the general traveling public, the railways, and the ticket brokers, by common consent, by usage, and by understanding, have all treated said tickets as articles of property, and as negotiable and transferable to any person desiring to purchase and travel on the same when genuine and bona fide; and respondents deny that these respondents have ever fraudulently dealt in the return coupons of such tickets, or that complainant has ever been damaged in respect thereto, by any act of respondents.

10.

Respondents admit that it is their hope and expectation to buy and sell the return portions of said U. C. V. Reunion tickets, but they deny that they will solicit, induce, or persuade the holders thereof to sell such return portions to respondents upon any false or fraudulent pretense or representation upon the part of respondents.

Respondents admit that they, in common with the general public, have some knowledge of the character and terms of the proposed tickets; that they are informed and believe that such tickets will be issued at low rates, to induce and enable the traveling public to at-

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any judgment for damages, which might be recovered against him. Denial was made of the allegation of the bill that the willingness or ability of the complainant to continue issuing special-rate tickets would be affected by the failure to obtain the relief sought.

tend said reunion in large numbers; that respondents expect to offer the same for sale, if they shall acquire any of said tickets, and will sell such tickets to persons other than the original purchasers, for such price as they are willing to pay, and that it is no concern of complainant or its connections, or other railways, whether respondents make a profit or a loss in the proposed dealing in said U. C. V. reunion tickets.

14.

Respondents admit that it is the custom and usage of complainant and its connections to issue railroad tickets at reduced rates to the traveling public on various occasions, such as expositions, conventions, Mardi Gras, reunions, or other public gatherings, and that the tickets which are usually issued by complainant purport by their terms to be nontransferable and to constitute a so-called "special contract" in express terms between complainant, the lines issuing the same, all other lines over which the same entitle the holders to travel, and the original purchasers of said tickets, whereby the said original purchasers are forced to agree that said ticket shall not be transferred by them to any other persons; but respondents show that said tickets, when issued by complainant and its connecting lines and other railways, on such occasions as expositions, reunions, conventions, Mardi Gras, and the like, are, in practice and general consent and common understanding of the traveling public, the railways, and the ticket brokers, when bona fide and genuine tickets, good for the return passage over the lines of said complainant and its connections and other railways, in the hands of the holders thereof, whether such holders be the original purchasers or not; that such practice and such understanding are common and general all over the United States; that such tickets are sold and dealt in as legitimate business in every large city, to the knowledge of the complainant, and such tickets are and have been for many years sold by complainant with full knowledge of the fact that they are, in practice and general understanding of the traveling public, good in the hands of any holder.

15.

Respondents jointly and severally admit that each of them are, and have been for some time, separately engaged in the lawful business of buying, selling, and dealing in such tickets, and in soliciting and inducing the original purchasers thereof to sell and transfer the same to respondents, with the intent and purpose that such tickets shall be used by the second purchaser thereof, but respondents deny that such use is a violation in law or in fact of the terms thereof. And respondents deny any knowledge that such use of said tickets by persons other than the original holders is any fraud upon complainant or the railways issuing such tickets when the same are genuine and bona fide; and respondents again aver that it is a matter of no concern or interest to the complainant or the railways issuing such tickets, whether the original purchasers are the holders and presenters of the same, or whether the holder has purchased said ticket from the original purchaser, or whether such holder has purchased the same from a ticket broker, or whether, as frequently happens, one of such tickets is accidentally or otherwise exchanged for another of the same class and form.

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by the bill, and, in the main, the averments of the article of the bill relating to various ticket brokers' associations were also denied.

As a distinct ground for denying the relief prayed, it was alleged in various forms that the issue of the proposed nontransferable tickets was the result of an unlawful confederation or combination between the various railroads whose roads entered into the city of New Orleans.

Upon the bill and answer a preliminary injunction was issued, restraining the dealing in nontransferable tickets issued for the approaching United Confederate Veterans' Reunion. Replication was duly filed to the answer. Subsequently, upon depositions taken in the cause, and upon affidavits showing the character of nontransferable tickets proposed to be issued for an approaching Mardi Gras festival, a further injunction *pendente lite* was granted as to dealings in the nontransferable reduced-rate, round-trip tickets issued for use on the occasion of the aforesaid Mardi Gras festival.

Thereafter a demurrer was filed to the bill for want of equity and because the case made by the bill was a moot, and not a real, controversy, and it was overruled. Then an application was made for leave to file a plea to the jurisdiction, which was refused.

At the hearing the complainant introduced the depositions of two witnesses and no evidence was given on behalf of the defendants. As before stated, the circuit court entered a final decree perpetually enjoining the dealing in nontransferable reduced-rate, round-trip tickets issued for the United Confederate Veterans' Reunion and the Mardi Gras festivals, and denying relief as to future issues of tickets of a like character.

On appeal and cross appeal the circuit court of appeals held that the complainant was entitled to the full relief prayed in the bill, and consequently to an injunction restraining the dealing by the defendants not only in the tickets issued for the United Confederate Veterans' Reunion and the past Mardi Gras festival, but from carrying on the business of like dealing in nontransferable reduced-rate tickets which might be issued in the future by the complainant, and the circuit court was directed to decree accordingly.

Messrs. Louis Marshall, Henry L. Lazarus, and Moritz Rosenthal for petitioners.

Messrs. Joseph Paxton Blair, Brode B. Davis, and George Denegre for respondent.

Mr Justice WHITE, after making the foregoing statement, delivered the opinion of the court:

The points urged at bar on behalf of the petitioners as estab-

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lishing that the decrees below should be reversed and the bill of complaint dismissed, and, in any event, the injunction be modified and restricted, are the following:

"1. The bill of complaint does not state a cause of action, either at law or in equity, against any of the defendants, even though the tickets in which they dealt are in form nontransferable, when the original purchasers disposed of them in breach of their contract with the complainant.

"2. The complainant has shown no sufficient ground for equitable intervention, since, assuming, but not admitting, that the acts charged against the defendants are wrongful, tortious, or even fraudulent, it has a plain, adequate, and complete remedy at law to redress such wrongs.

"3. There was an improper joinder of defendants and of independent causes of action. The bill is multifarious and the case does not fall within the rule concerning the avoidance of a multiplicity of suits.

"4. The circuit court was without jurisdiction, notwithstanding the colorable averments contained in the bill that the injury sustained in consequence of the defendants' act exceeded \$2,000, there being no foundation in fact in support of such averment.

"5. The decree of injunction awarded by the circuit court of appeals, so far as it relates to nontransferable tickets that may be hereafter issued, is in effect the exercise of legislative, as distinct from judicial, power, since it undertakes to promulgate a rule applicable to conditions and circumstances which have not yet arisen, and to prohibit the petitioners from dealing in tickets not *in esse*, and not even in contemplation, and is, therefore, violative of the most fundamental principle of our government."

Stated in logical sequence and reduced to their essence, these propositions assert:

First, want of jurisdiction from the insufficiency of the amount involved, want of power in a court of equity to grant relief because, on the face of the bill, relief at law was adequate, and because equitable relief was improper on account of misjoinder of parties and causes of action.

Second, because the case as made did not entitle to relief, since it did not show the commission of any legal wrong by the defendants.

Third, because, conceding the right to relief, the remedy by injunction which the court accorded was so broad as, in effect, to amount to the exertion of legislative, as distinct from judicial, power, and hence was equivalent to the denial of due process of law.

As, for reasons hereafter to be stated, we think the contentions embodied in the first proposition as to want of jurisdiction, etc., are without merit, we come at once to the fundamental

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question involved in the second proposition; that is, the absence of averment or proof as to the commission of a legal wrong by the defendants.

That the complainant had the lawful right to sell nontransferable tickets of the character alleged in the bill at reduced rates we think is not open to controversy, and that the condition of nontransferability and forfeiture embodied in such tickets was not only binding upon the original purchaser, but upon anyone who acquired such a ticket and attempted to use the same in violation of its terms, is also settled. *Mosher v. St. Louis, I. M. & S. R. Co.*, 127 U. S. 390, 32 L. Ed. 249, 8 Sup. Ct. Rep. 1324. See also, *Boylan v. Hot Springs R. Co.*, 132 U. S. 146, 33 L. Ed. 290, 10 Sup. Ct. Rep. 50.

True, these cases were decided before the passage of the act to regulate commerce, but the power of carriers engaged in interstate commerce to issue nontransferable reduced-rate excursion tickets was expressly recognized by that act, and the operation and binding effect of the nontransferable clause in such tickets upon all third persons acquiring the same and attempting to use them, and the duty of the carrier in such case to use due diligence to enforce a forfeiture, results from the context of the act. Thus, by § 22, it was provided "that nothing in this act shall apply to * * * the issuance of mileage, excursion, or commutation passenger tickets." [24 Stat. at L. 387, chap. 104, U. S. Comp. Stat. 1901, p. 3170.] And it is to be observed that, despite the frequent changes in the act, including the comprehensive amendments embodied in the act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, U. S. Comp. Stat. Supp. 1907, p. 892), the provision in question remains in force, although the Interstate Commerce Commission, charged with the administrative enforcement of the act, has directed the attention of Congress to the importance of defining the scope of such tickets in view of the abuses which might arise from the exercise of the right to issue them. (2 Inters. Com. Rep. 340.) And, when the restrictions embodied in the act concerning equality of rates and the prohibitions against preferences are borne in mind, the conclusion cannot be escaped that the right to issue tickets of the class referred to carried with it the duty on the carrier of exercising due diligence to prevent the use of such tickets by other than the original purchasers, and therefore caused the nontransferable clause to be operative and effective against anyone who wrongfully might attempt to use such tickets. Any other view would cause the act to destroy itself; since it would necessarily imply that the recognition of the power to issue reduced-rate excursion tickets conveyed with it the right to disregard the prohibitions against preferences which it was one of the great purposes of the act to render efficacious. This must follow, since,

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if the return portion of the round-trip ticket be used by one not entitled to the ticket, and who otherwise would have had to pay the full one-way fare, the person so successfully traveling on the ticket would not only defraud the carrier, but effectually enjoy a preference over similar one-way travelers who had paid their full fare, and who were unwilling to be participants in a fraud upon the railroad company.

Any third person acquiring a nontransferable reduced-rate railroad ticket from the original purchaser, being therefore bound by the clause forbidding transfer, and the ticket in the hands of all such persons being subject to forfeiture on an attempt being made to use the same for passage, it may well be questioned whether the purchaser of such ticket acquired anything more than a limited and qualified ownership thereof, and whether the carrier did not, for the purpose of enforcing the forfeiture, retain a subordinate interest in the ticket, amounting to a right of property therein, which a court of equity would protect. *Board of Trade v. Christie Grain & Stock Co.*, 198 U. S. 236, 49 L. Ed. 1031, 25 Sup. Ct. Rep. 637, and authorities there cited. See also, *Sperry & H. Co. v. Mechanics' Clothing Co.*, 128 Fed. 800. We pass this question, however, because the want of merit in the contention that the case as made did not disclose the commission of a legal wrong conclusively results from a previous decision of this court. The case is *Angle v. Chicago, St. P. M. & O. R. Co.*, 151 U. S. 1, 38 L. Ed. 55, 14 Sup. Ct. Rep. 240, where it was held that an actionable wrong is committed by one "who maliciously interferes in a contract between two parties and induces one of them to break that contract to the injury of the other." That this principle embraces a case like the present, that is, the carrying on of the business of purchasing and selling nontransferable reduced-rate railroad tickets for profit, to the injury of the railroad company issuing such tickets, is, we think, clear. It is not necessary that the ingredient of actual malice, in the sense of personal ill will, should exist to bring this controversy within the doctrine of the *Angle Case*. The wanton disregard of the rights of a carrier, causing injury to it, which the business of purchasing and selling nontransferable reduced-rate tickets of necessity involved, constitute legal malice within the doctrine of the *Angle Case*. We deem it unnecessary to restate the grounds upon which the ruling in the *Angle Case* was rested, or to trace the evolution of the principle in that case announced, because of the consideration given to the subject in the *Angle Case* and the full reference to the authorities which was made in the opinion in that case.

Certain is it that the doctrine of the *Angle Case* has been frequently applied in cases which involved the identical question here at issue,—that is, whether a legal wrong was committed by

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the dealing in nontransferable reduced-rate railroad excursion tickets. *Pennsylvania R. Co. v. Beekman*, 30 Wash. L. Rep. 715; *Illinois C. R. Co. v. Caffrey*, 128 Fed. 770; *Delaware, L. & W. R. Co. v. Frank*, 110 Fed. 689; *Nashville, C. & St. L. R. Co. v. McConnell*, 82 Fed. 65.

Indeed, it is shown by decisions of various state courts of last resort that the wrong occasioned by the dealing in nontransferable reduced-rate railroad tickets has been deemed to be so serious as to call for express legislative prohibition correcting the evil. *Kinner v. Lake Shore & M. S. R. Co.*, 69 Ohio St. 339, 69 N. E. 614; *Schubach v. McDonald*, 179 Mo. 163, 65 L. R. A. 136, 101 Am. St. Rep. 452, 78 S. W. 1020, and cases cited; *Samuelson v. State*, 116 Tenn. 470, 115 Am. St. Rep. 805, 95 S. W. 1012. In the case last referred to, where the subject is elaborately reviewed, the supreme court of Tennessee, in holding that the prohibitive statute was not unconstitutional as forbidding a lawful business, and in affirming a criminal conviction for violating the statute, observed:

"That the sale as well as the purchase of nontransferable passage tickets is a fraud upon the carrier and the public, the tendency of which is the demoralization of rates, has been settled by the general consensus of opinion among the courts."

Concluding, as we do, that the commission of a legal wrong by the defendants was disclosed by the case as made, we are brought to consider the several contentions concerning the jurisdiction of the court and its right to afford relief. The bill contained an express averment that the amount involved in the controversy exceeded, exclusive of interest and costs, the sum of \$5,000 as to each defendant. The defendants not having formally pleaded to the jurisdiction, it was not incumbent upon the complainant to offer proof in support of the averment. Nevertheless, the complainant introduced testimony tending to show that, on the New Orleans division of its road, a loss of from fifteen to eighteen thousand dollars a year was sustained through the practice by dealers of wrongfully purchasing and selling nontransferable tickets. That hundreds of the tickets annually issued for the Mardi Gras festivals in New Orleans were wrongfully bought and sold; that other nontransferable reduced-rate tickets were, in a like manner, illegally trafficked in to the great damage of the corporation, and that the defendants were the persons principally engaged in conducting such wrongful dealings. But, even if this proof be put out of view, we think the contention that a consideration of the whole bill establishes that the jurisdictional amount alleged was merely colorable and fictitious is without merit. We say this because the averments of the bill as to the number of such tickets issued, the recurring occasions for their issue, the magnitude of the wrongful dealings

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in the nontransferable tickets by the defendants, the cost and the risk incurred by the steps necessary to prevent their wrongful use, the injurious effect upon the revenue of the complainant, the operation of the illegal dealing in such tickets upon the right of the complainant to issue them in the future coupled with the admissions of the answer, sustain the express averment as to the requisite jurisdictional amount. Besides, the substantial character of the jurisdictional averment in the bill is to be tested, not by the mere immediate pecuniary damages resulting from the acts complained of, but by the value of the business to be protected and the rights of property which the complainant sought to have recognized and enforced. *Hunt v. New York Cotton Exchange*, 205 U. S. 322, 336, 51 L. Ed. 821, 826, 27 Sup. Ct. Rep. 529.

The contention that, though it be admitted, for the sake of the argument, that the acts charged against the defendant "were wrongful, tortious, or even fraudulent," there was no right to resort to equity, because there was a complete and adequate remedy at law to redress the threatened wrongs when committed, is, we think, also devoid of merit. From the nature and character of the nontransferable tickets, the number of people to whom they were issued, the dealings of the defendants therein and their avowed purpose to continue such dealings in the future, the risk to result from mistakes in enforcing the forfeiture provision, and the multiplicity of suits necessarily to be engendered if redress was sought at law,—all establish the inadequacy of a legal remedy and the necessity for the intervention of equity. Indeed, the want of foundation for the contention to the contrary is shown by the opinions in the cases which we have previously cited in considering whether a legal wrong resulted from acts of the character complained of, since, in those cases, it was expressly held that the consequences of the legal wrong flowing from the dealing in nontransferable tickets were of such a character as to entitle an injured complainant to redress in a court of equity.

There is an opinion of the supreme court of New York (not the court of last resort) which would seem to express contrary views (*New York C. & H. R. R. Co. v. Reeves*, 41 Misc. 490, 85 N. Y. Supp. 28), but the reasoning there relied on, in our opinion, is inconclusive.

The proposition that the bill was multifarious because of the misjoinder of parties and causes of action was not assigned as error in the circuit court of appeals, and, therefore, might well be held not to be open. But, passing that view, we hold the objection to be untenable. The acts complained of as to each defendant were of a like character, their operation and effect upon the rights of the complainant were identical, the relief sought

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against each defendant was the same, and the defenses which might be interposed were common to each defendant and involved like legal questions. Under these conditions the case is brought within the principle laid down in *Hale v. Allison*, 188 U. S. 56, 77, 47 L. Ed. 380, 392, 23 Sup. Ct. Rep. 244.

As we have stated, the circuit court granted a preliminary injunction, restraining the defendants from illegally dealing in tickets issued on account of the United Confederate Veterans' Reunion, and, before final hearing, granted a second injunction, restraining such dealing in like tickets issued for the approaching Mardi Gras festival. By the final decree these injunctions were perpetuated, the court declining to grant the relief sought by the complainant in relation to nontransferable tickets to be issued for the future, without prejudice, however, to the right of the complainant to seek relief by independent proceedings on each occasion when it might issue such nontransferable tickets. The circuit court of appeals decided that error had been committed in refusing to grant an injunction against dealing in nontransferable tickets to be issued in the future, and directed that the decree below be enlarged in that particular. It is insisted that the circuit court of appeals erred in awarding an injunction as to dealings "in nontransferable tickets that may be hereafter issued * * * since it thereby undertook to promulgate" a rule applicable to conditions and circumstances which have not yet arisen, and to prohibit "the petitioners from dealing in tickets not *in esse* * * * and is, therefore, violative of the most fundamental principles of our government." But when the broad nature of this proposition is considered, it but denies that there is power in a court of equity in any case to afford effective relief by injunction. Certain is it that every injunction, in the nature of things, contemplates the enforcement, as against the party enjoined, of a rule of conduct for the future as to the wrong to which the injunction relates. Take the case of trespasses upon land where the elements entitling to equitable relief exist. See *Slater v. Gunn*, 170 Mass. 509, 41 L. R. A. 268, 49 N. E. 1017, and cases cited. It may not be doubted that the authority of a court would extend, not only to restraining a particular imminent trespass, but also to prohibiting like acts for all future time. The power exerted by the court below which is complained of was in no wise different. The bill averred the custom of the complainant at frequently occurring periods to issue reduced-rate, nontransferable tickets for fairs, conventions, etc., charged a course of illegal dealing in such nontransferable tickets by the defendants, and sought to protect its right to issue such tickets by preventing unlawful dealings in them. The defendants in effect not only admitted the unlawful course of dealing as to particular tickets then outstanding, but expressly avowed that

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they possessed the right, and that it was their intention to carry on the business as to all future issues of a similar character of tickets. The action of the circuit court of appeals, therefore, in causing the injunction to apply not only to the illegal dealings as to the then outstanding tickets, but to like dealings as to similar tickets which might be issued in the future, was but the exertion by the court of its power to restrain the continued commission against the rights of the complainant in the future of a definite character of acts adjudged to be wrongful. Indeed, in view of the state of the record, the inadequacy of the relief afforded by the decree as entered in the circuit court is, we think, manifest on its face. The necessary predicate of the decree was the illegal nature of the dealings by the defendants in the outstanding tickets, and the fact that such dealings, if allowed, would seriously impair the right of the complainant in the future to issue the tickets. Doubtless, for this reason the decree was made without prejudice to the right of the complainant to apply for relief as to future issues of tickets by independent proceedings whenever, on other occasions, it was determined to issue nontransferable tickets. But this was to deny adequate relief, since it subjected the complainant to the necessity, as a preliminary to the exercise of the right to issue tickets, to begin a new suit with the object of restraining the defendants from the commission in the future of acts identical with those which the court had already adjudged to be wrongful and violative of the rights of the complainant.

In *Scott v. Donald*, 165 U. S. 107, 41 L. Ed. 648, 17 Sup. Ct. Rep. 262, on holding a particular seizure of liquor under the South Carolina dispensary law to be invalid, an injunction was sustained, not only addressed to the seizure in controversy, but which also operated to restrain like seizures of liquors in the future, and the exertion of the same character of power by a court of equity was upheld in the cases of *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 50 L. Ed. 192, 26 Sup. Ct. Rep. 91, and *Swift & Co. v. United States*, 196 U. S. 375, 49 L. Ed. 518, 25 Sup. Ct. Rep. 276.

Nor is there merit in the contention that the decision in *New York N. H. & H. R. Co. v. Interstate Commerce Commission*, 200 U. S. 404, 40 L. Ed. 526, 26 Sup. Ct. Rep. 272, supports the view here relied upon as to the limited authority of a court of equity to enjoin the continued commission of the same character of acts as those adjudged to be wrongful. On the contrary, the ruling in that case directly refutes the claim based on it. There certain acts of the carrier were held to have violated the act to regulate commerce. The contention of the government was that, because wrongful acts of a particular character had been committed, therefore an injunction should be awarded

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against any and all violations in the future of the act to regulate commerce. Whilst this broad request was denied, it was carefully pointed out that the power existed to enjoin the future commission of like acts to those found to be illegal, and the injunction was so awarded. The whole argument here made results from a failure to distinguish between an injunction generally restraining the commission of illegal acts in the future and one which simply restrains for the future the commission of acts identical in character with those which have been the subject of controversy, and which have been adjudged to be illegal. Affirmed.

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(Court of Appeals of Kentucky, March 19, 1908.)

[108 S. W. Rep. 336.]

Carriers—Personal Injuries—Condition and Use of Premises.

In an action against a railroad company for injuries to a passenger from exposure to cold while awaiting removal of obstruction from the track in order to reach the depot, the question as to unreasonable or unlawful obstruction was, on conflicting evidence, for the jury.

Same.—It was defendant's duty to furnish reasonable safe and comfortable depot accommodations, and not to permit its trains to stands across the highway in front of its station for an unreasonable time, thereby preventing plaintiff from going into the station, and compelling her to remain in the cold.

Same—Contributory Negligence.—While it was the duty of a passenger, whose access to the depot had been obstructed by a train standing across the track for an unreasonable length of time, to seek shelter from the cold, and not recklessly remain outside, it was not her duty to enter a near-by store, which, to her knowledge, had the reputation of being a place that a modest woman could not with propriety enter.

Negligence—Proximate Cause.*—Where an act of negligence has

*For the authorities in this series on the right to recover for personal injuries which would not have resulted but for the disease or otherwise peculiar physical condition of the person injured, see *Normile v. Wheeling Traction Co.* (W. Va.), 18 R. R. R. 235, 41 Am. & Eng. R. Cas., N. S., 235; *Southern Pac. Co. v. Cavin* (C. C. A.), 20 R. R. R. 803, 43 Am. & Eng. R. Cas., N. S., 803 (disease aggravated by injuries); *Indiana Union Traction Co. v. Jacobs* (Ind.), 20 R. R. R. 653, 43 Am. & Eng. R. Cas., N. S., 653 (aggravation of an existing bodily condition is not special damage that must be specially pleaded); *Keefe v. Norfolk, etc., R. Co.* (Mass.), 13 R. R. R. 792, 36 Am. & Eng. R. Cas., N. S., 792 (climacteric likely to occur before recovery); see generally, note by Mr. Howe, 1 Am. & Eng. R. Cas., N. S., xix et seq.

For the authorities in this series on the question what is, and is

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been committed, or a wrongful act done, resulting in injury or damage, the party committing it will be responsible for all the consequences that naturally and reasonably flow from the negligent or wrongful act, although the result may not be immediately connected with the cause.

Damages—Physical Injuries—Aggravation of Condition.*—Where a railway company obstructed access to its depot causing a lady passenger to stand outside exposed to the cold for an unreasonable time, it was liable for resulting injury to her health, though her loss of health was much aggravated by the fact that such exposure was during her menstrual period.

Appeal from Circuit Court, Hardin County.

"Not to be officially reported."

Action by Anna Daugherty against the Louisville & Nashville Railroad Company for injuries from exposure while awaiting a train. From a judgment for plaintiff, defendant appeals. Affirmed.

Chas. H. Moorman and Benjamin D. Warfield, for appellant.
Irwin & Irwin and L. A. Faurest, for appellee.

CARROLL, J. In January, 1907, the appellee, accompanied by her little girl and her brother, went from her father's house, about one-half a mile distant, to the depot at Nelsonville, for the purpose of taking passage on a train to Elizabethtown. The morning was extremely cold, the thermometer being six degrees below zero, and the ground was covered with snow. Between the depot and the platform used by passengers in getting off and on trains there was a passing track, and on the morning in question there was standing on this passing track a freight train. A short distance north and south of the depot, which was on the east side of the track, public county roads crossed the track. Appellee's father lived on the west side of the railroad, and on coming to the crossing north of the depot on her way from her father's home it was found obstructed by this train. Finding that they could not cross, they got out of the buggy in which they were riding and walked down to the platform, which was also ob-

not, the proximate cause of an injury, see foot-note appended to *Haley v. St. Louis Transit Co. (Mo.)*, 12 R. R. R. 142, 35 Am. & Eng. R. Cas., N. S., 142, where all those preceding it are collected, foot-notes appended to *Missouri, etc., Ry. Co. v. Welch (Tex.)*, 25 R. R. R. 700, 48 Am. & Eng. R. Cas., N. S., 700; *Liles v. Fosburgh Lumber Co. (N. Car.)*, 25 R. R. R. 517, 48 Am. & Eng. R. Cas., N. S., 517; *Hayes v. Southern Ry. Co. (N. Car.)*, 24 R. R. R. 547, 47 Am. & Eng. R. Cas., N. S., 547; foot-notes appended to *Chicago, etc., R. Co. v. Chestnut Bros. (Ky.)*, 24 R. R. R. 108, 47 Am. & Eng. R. Cas., N. S., 108; foot-notes appended to *Thompson v. Cleveland, etc., Ry. Co. (Ill.)*, 23 R. R. R. 233, 46 Am. & Eng. R. Cas., N. S., 233; *Stone v. Union Pac. R. Co. (Utah)*, 23 R. R. R. 119, 46 Am. & Eng. R. Cas., N. S., 119.

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structed by the train as was the crossing south of the depot. Being prevented by the obstructions from getting to the depot, appellee was obliged to remain standing on the exposed platform some 30 minutes, and until the train she desired to take passage on, which was late, arrived. There was a store on the west side of the railroad a short distance from the platform into which appellee might have gone and have been protected from the severity of the weather, but the woman who owned and was in charge of the store was a person of bad character, and it was not a suitable place for a lady of good reputation to go. For this reason appellee, who knew the bad repute of the store, did not go there. As a result of the exposure, appellee was nearly frozen, and the menstrual flow from her monthly sickness with which she was then suffering was stopped. As a result of the exposure happening at this particular time, her health was seriously impaired, and it is doubtful if she will ever be restored to her robust and vigorous condition previous to the exposure. From a judgment in her favor for \$1,500 this appeal is prosecuted.

Appellant insists: (1) That there was no evidence of an unreasonable or unlawful obstruction of the crossings; (2) that the obstructions were not the proximate cause of appellee's exposure and subsequent illness; (3) that the instructions were erroneous, confusing, and prejudicial; and (4) that the jury should have been directed to return a verdict for appellant.

The evidence as to the obstruction of the crossings is conflicting but it was sufficient to authorize a submission of this question to the jury, and, as the weight to be given to the evidence for and against this proposition was for the jury to determine under proper instructions, we cannot say that the finding was flagrantly against the evidence. Upon this point the jury were instructed that it was the duty of the defendant to keep the crossings to its depot free from obstructions, and not allow its trains on the side track to stand coupled together over the crossings exceeding five minutes at any one time. This instruction was based on subsection 5 of section 768 of the Kentucky Statutes of 1903, providing that, when a railroad is constructed across any highway or street, it shall not obstruct the same for more than five minutes at any one time. The evidence for appellee conduced to show that the public road crossings were obstructed not only for five minutes, but for 25 or 30 minutes, before the arrival of the train; and that these obstructions, in connection with the obstruction at the depot, prevented appellee from entering the depot or waiting room of the station, thereby obtaining shelter from the cold. When appellee went to the depot for the purpose of taking passage on one of appellant's trains, it was the duty of appellant to furnish her reasonably safe

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and comfortable accommodations, and not to permit its cars or trains to stand across the highway and in front of its station for an unreasonable length of time, thereby preventing appellee from going into the station and requiring her to remain in the cold. In 6 Cyc. p. 536, it is said: "The relation of carrier and passenger commences when a person with the goodfaith intention of taking passage, and with the express or implied consent of the carrier, places himself in a situation to avail himself of the facilities for transportation which the carrier offers. In the case of a railroad; this relation arises not merely when the passenger enters the train with a ticket already purchased, giving him a contract right to ride, but when he enters upon the premises of the carrier with intention to take a train in due course." In *Hutchinson on Carriers*, § 937, the rule is laid down that it is the "duty of passenger carriers by railroad to provide reasonably safe means of getting to or from their stations and trains." In *Louisville & Nashville R. R. Co. v. Kellar*, 104 Ky. 768, 47 S. W. 1072, this court held that a passenger on a train, who alighted on the platform at a station in the rain and was prevented from getting into the depot by a freight train standing on a track between the platform and the depot, was entitled to recover damages for injuries sustained by her on account of her exposure to the weather. It was argued for the company that, when a passenger is assisted from the passenger train to the platform at the depot, the company ceased to owe him any duty, that he was no longer a passenger, and the company was not negligent in permitting the freight train to stand on the track between the platform and the depot. In response to this argument, the court said: "We cannot assent to such a proposition. We are of the opinion that appellee did not cease to be a passenger when she alighted from the train, but, on the contrary, was a passenger, and entitled to protection from the weather in the depot of appellant for a reasonable length of time to prepare her to resume her journey. Being entitled as a passenger to the use of the depot for shelter, she was likewise entitled to an open and unobstructed way thereto, and especially is this true under such circumstances as were here presented." From these authorities, the reasoning of which seems to be sound, we conclude that, when a person goes to a station upon a line of railway for the purpose of taking passage upon one of its trains, it is the duty of the carrier to provide such passenger with reasonable accommodations, and to afford him reasonable means of getting into the depot provided for the accommodation of passengers. And that when appellant, as in this case, obstructed for an unreasonable length of time the means of entrance to its depot, it was guilty of negligence, and appellee was entitled to recover such damages as she sustained that resulted directly from and were the proximate cause of the negligence.

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It is argued that it was the duty of appellee to have taken refuge in the store of Mrs. Peters near by, where she would have been protected from the cold, and might have remained until the arrival of the train. There was evidence conducing to show that the place kept by Mrs. Peters was not a suitable or proper place for ladies to visit or go, and that appellee, knowing the general reputation of the place, did not believe that she could with propriety take shelter there. It was the duty of appellee, when she found the way to the depot obstructed, to take such action as a person of ordinary prudence and judgment, situated as she was, would take to find shelter and protection from the cold, and she could not purposely, recklessly, or carelessly remain standing out in the weather, and then recover damages for injuries caused by her want of care, if she might by the exercise of ordinary prudence have found a place of shelter. *Sandifer v. L. & N. R. R. Co.*, 89 S. W. 528, 28 Ky. Law Rep. 464. A person so situated must exercise reasonable care and prudence to minimize the injury sustained and prevent as far as reasonable any loss or damage resulting from the negligent or wrongful acts of the adverse party. *Hutchinson on Carriers*, § 1431. But the duty thus imposed upon appellee did not require her to go to a place that a modest and refined lady could not with propriety enter. Good faith on her part, her duty to minimize the injury, and the exercise of ordinary prudence and judgment did not demand that she should subject herself to the humiliation of going in a place that was shunned by respectable ladies. Upon this point the court instructed the jury that it was the duty of appellee, when she found the way to the depot obstructed, "to use ordinary care to obtain shelter from the weather if such shelter could reasonably have been obtained, and if she failed to use such care in obtaining shelter elsewhere as a person of ordinary prudence would have exercised under similar circumstances, then the law is for the defendant, and the jury should so find." This instruction fairly presented the duty imposed upon appellee. She was not required to do more than was pointed out in this instruction. Upon this issue the jury evidently accepted as true the evidence offered by appellee tending to show the bad character of the place kept by Mrs. Peters, and concluded that appellee in the exercise of ordinary prudence and judgment was not required to enter it.

The next contention is that appellant's negligence, assuming that it was guilty, was not the proximate cause of the injury to appellee's health. The question of proximate cause in personal injury cases has been so fully covered by this court in the cases of *Setter's Adm'r v. City of Maysville*, 114 Ky. 60, 69 S. W. 1074, *Louisville Home Telephone Co. v. Gasper*, 93 S. W. 1057, 29 Ky. Law Rep. 582, 9 L. R. A. (N. S.) 548, and *Snydor v.*

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Arnold, 92 S. W. 289, 28 Ky. Law Rep. 1250, that we do not deem it necessary to go into any extended discussion of the subject. It is sufficient to say that, when an act of negligence has been committed, or a wrongful act done, resulting in injury or damage, the party committing it will be responsible for all the consequences that naturally and reasonably flow from the negligent or wrongful act, although the result may not be immediately connected with the cause. It is a familiar rule that there can be no recovery for the negligent acts of another unless they were the proximate cause of the injury complained of. To put it in another way, it must appear that the injury was the natural and probable result of the negligent or wrongful act. When appellant's negligence obliged appellee to remain standing on the platform, exposed to the weather, it became responsible to her for all the injuries she sustained directly traceable to its negligence. It may be conceded that appellee's loss of health was much aggravated by the fact of her sickness, and that except for this sickness the exposure to the cold would not have affected her seriously, or have been especially harmful. Hence it is said for appellant that, as it could not have anticipated or known of appellee's condition, it should not be chargeable with the consequences that resulted from it. In other words, its claim is that the impairment of appellee's health was due, not to the obstruction that interfered with her going into the station, but to the fact that she was at the time sick. Upon this point we may say that if a person injured is feeble, sick, or diseased, and the negligence or wrongful act aggravates the illness or disease, or produces conditions that would not ordinarily or reasonably have existed or occurred except for the negligence or wrongful act, and are directly attributable to it, the injured party may recover all the damages that flow from the negligence of wrongful act, including such as result from illness, sickness, or disease aggravated by or that are produced by it, although the person inflicting the injury may not at the time know that the person injured is laboring under any infirmity, sickness, or disability.

This rule is fully supported by the great weight of authority. In Thompson on Negligence, § 150, it is said: "The duty of care and of abstaining from injuring another applies to the sick, weak and infirm, as well as to the strong and healthy. When this duty is violated, the measure of damages is the injury which results, though this injury may not have followed but for the peculiar physical condition of the person injured, although it may have been thereby aggravated." In Shearman & Redfield on Negligence, § 742, it is said: "Though the plaintiff be afflicted with a disease or a weakness, which has a tendency to aggravate the injury, defendant's negligence will still be held to be the proximate cause." In *Lapline v. Morgan's Louisiana*

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Railroad, 40 La. Ann. 661, 4 South. 875, 1 L. R. A. 378, in discussing the liability of a railroad company for an act of negligence, the court said: "The duty of care and of abstaining from injuring another is due to the weak, sick, and infirm equally with the healthy and strong; and when that duty is violated, the measure of damage is the injury inflicted, even though that injury may have been aggravated or might not have happened at all but for the peculiar physical condition of the person injured." In *Brown v. Chicago R. Co.*, 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41, where a pregnant woman was put off of a railway train at the wrong place, and the exertion of walking home brought on a sickness, it was held that the railroad company was liable for the full damage, and this although the servants in charge of its train, and who put the woman off, did not know the state of her health. In *Purcell v. St. Paul City Ry. Co.*, 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203, the Supreme Court of Minnesota, in a case where the injury to a passenger was aggravated by a miscarriage caused by its negligence, said: "The defendant suggested that plaintiff's pregnancy rendered her more susceptible to groundless alarm, and accounts more naturally and fairly than defendant's negligence for the injurious consequences. Certainly a woman in her condition has as good a right to be carried as any one, and is entitled to at least as high a degree of care on the part of the carrier. * * * When the act or omission is negligence as to any and all passengers, well or ill, any one injured by the negligence must be entitled to recover to the full extent of the injury so caused, without regard to whether, owing to his previous condition of health, he is more or less liable to injury." In *Hutchinson on Carriers*, § 1432, it is said: "If the passenger, at the time an injury is received through the negligence of the carrier, is suffering from some disease or illness which tends to aggravate the injury, the passenger's previous infirmity will not excuse the carrier from answering in damages to the full extent of the injury as affected by such infirmity, and the fact that the carrier was not informed of the passenger's condition will make no difference. So, where a female passenger, who was pregnant, was injured in a collision of cars, it was held that the carrier was liable for the injury, notwithstanding the fact that had she not been pregnant she would not have been injured."

We are of the opinion that the instructions presented correctly the law of the case, and in other respects the appellant had a fair trial.

Wherefore the judgment of the lower court is affirmed.

WALTERS v. SEATTLE, R. & S. RY. CO.

(Supreme Court of Washington, Jan. 15, 1908.)

[93 Pac. Rep. 419.]

Carriers—Injury to Passengers—Obstruction on Track—Liability.*—A railway company may not escape liability for injury to a passenger in a collision, caused by an obstruction on the track, merely because the obstruction was caused by an agency over which it had no control. In addition it must show that it could not, by the highest degree of care and diligence, consistent with the practical operation of the road, have discovered and removed the obstruction prior to the collision.

Same—Res Ipsa Loquitur—Specific Allegations—Effect.—In an action against an electric railway company for injury to passenger in a collision, caused by an obstruction on a track, she did not waive her right to rely upon a presumption of negligence arising from the fact of the injury by particularly alleging the cause of the accident.

Witness—Cross-Examination—Questions Tending to Degrade Witness.—In an action for personal injury received in a street car accident, a former motorman, who testified as to the proper method of stopping a car on a grade such as where the accident happened, and on cross-examination stated that since ceasing to be a motorman he had been discharged as a policeman because of charges preferred against him, could not be compelled to state what the charges were, since the matter could not affect his credibility as a witness to the particular fact under consideration, and in such circumstances a witness may decline to answer questions whose only purpose is to degrade him or expose him to disgrace or infamy.

Appeal from Superior Court, King County; Mitchell Gilliam, Judge.

Personal injury action by Inez Walters, by Leona Walters, her guardian ad litem, against the Seattle, Renton & Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Sachs & Hale, for appellant.

Geo. P. Rossman and *Jackson Silbaugh*, for respondent.

*For the authorities in this series on the subject of the duties and liabilities of a carrier of passengers with respect to collisions between trains or cars, see foot-notes appended to *Chicago City Ry. Co. v. Schmidt* (Ill.), 21 R. R. R. 721, 44 Am. & Eng. R. Cas., N. S., 721.

As to the degree of care required of a railroad, as a carrier of passengers, with respect to its appliances and road, see foot-notes appended to *Southern Pac. Co. v. Schuyler* (C. C. A.), 17 R. R. R. 674, 40 Am. & Eng. R. Cas., N. S., 674; foot-notes appended to *Western Maryland R. Co. v. Shivers* (Md.), 17 R. R. R. 34, 40 Am. & Eng. R. Cas., N. S., 34.

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FULLERTON, J. The appellant owns and operates an electric railway extending from the city of Seattle to the town of Renton, in King county. On August 13, 1905, the respondent was a passenger on one of the appellant's cars, and was injured by a collision which occurred between the car on which she was riding and a car coming from the opposite direction. This action was brought to recover damages for the injuries received. At the trial the jury returned a verdict in favor of respondent for the sum of \$5,000. The trial judge deemed the recovery excessive, and reduced it to \$3,000, offering the respondent the alternative of accepting it, as reduced, or submitting to a new trial. The respondent accepted the modified verdict, and the judgment from which this appeal is taken was entered thereon.

The appellant requested an instruction to the effect that if the car which collided with the car on which the respondent was riding came in contact with some clay which had been deposited upon the track "by some agency not under the control of the defendant," and that when the car wheels struck such clay the car by reason of coming in contact therewith shot forward, and that the motorman thereon did all in his power to stop the car before it came into collision with the car on which the appellant was a passenger, but could not with the highest degree of care have prevented the collision, and the motorman on the other car was guilty of no negligence, then the appellant would not be liable for the collision, or liable in damages to the respondent for her injuries. This instruction the court properly refused. It does not correctly measure the appellant's duties. For a railway company carrying passengers to show merely that a collision was caused by some obstruction of the track, caused by an agency over which it had no control, is not enough to excuse it from responsibility for a collision. It must go further, and show that it could not, by the highest degree of care and diligence consistent with the practical operation of its railway, have discovered and removed the obstruction prior to the time it operated its cars over the track. The instruction requested omitted this qualification, and was therefore incorrect as a statement of the law.

The court charged the jury, in substance, that the happening of the collision raised a presumption of negligence on the part of the railway company, and that the respondent was entitled to recover thereon, unless they were convinced that the evidence on the part of the railway company overcame this presumption. The appellant admits the correctness of the rule as applied in this jurisdiction, but contends that there was here no room for its application, as the respondent did not content herself with alleging generally that she was a passenger on the car, that a collision occurred, and that she was injured thereby, but went farther and alleged particularly the cause of the accident, and

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that since she alleged the cause of the accident she must prove it, as alleged, or subject herself to a nonsuit. This contention is not tenable. The plaintiff was not deprived of the case proved by a failure to prove all that was alleged. She was only obligated to prove the substance of the issue, and by the substance of the issue is meant the facts essential to a recovery. "The rule is, that whatever cannot be stricken out without getting rid of a part essential to a cause of action must be retained, and, of course, proved even if it be described with unnecessary particularity." In this case all that pertained to the particular cause of the accident could have been stricken out and still enough remain to warrant a recovery. The particular cause of the accident was not therefore of the substance of the issue, and it was not necessary for the appellant to prove it in order to recover, even though it was alleged. Doubtless in many cases it is desirable to plead and prove the exact cause of an accident in order that the question of the defendant's negligence may be put beyond the peradventure of a doubt, and thus insure a recovery, where otherwise recovery might be doubtful if the presumption alone were relied upon. Such was perhaps the purpose of the plaintiff in this instance. But the plaintiff is not to be deprived of the case her pleadings and proofs made merely because she alleged a stronger case than she was able to prove. *Cassady v. Old Colony St. Ry. Co.*, 184 Mass. 156, 68 N. E. 10, 63 L. R. A. 285; *Chicago City Ry. Co. v. Carroll*, 206 Ill. 318, 68 N. E. 1087; *North Chicago St. Ry. Co. v. Cotton*, 140 Ill. 486, 29 N. E. 899; *Wood v. Roxborough, etc., Pass. N. Co. (Pa.)* 12 Montg. Co. Law Rep'r, 155.

A Mr. Johnson, who had formerly been a motorman in the employ of the Seattle Electric Company, was called as a witness on part of the respondent, and testified as to the proper method of stopping a car when on a grade such as the one on which the accident in question happened. On cross-examination he testified that he had been on the police force of the city of Seattle since he quit work for the Seattle Electric Company, but was dismissed therefrom because of certain charges which were preferred against him. He was asked what the charges were, and declined to answer. The question was repeated, when an objection was interposed, which the court sustained. It is claimed that this was error, but we think the ruling proper. The witness was being questioned on a collateral matter, which could affect only his credibility generally, not his credibility as a witness to the particular fact under consideration, or as a witness in the particular case. When such is the fact, a witness may decline to answer questions whose only purpose is to degrade him, or expose him to disgrace or infamy. That such was the purpose of this question cannot, of course, be gainsaid.

It is finally insisted that the amount of recovery is excessive,

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notwithstanding the reduction made by the trial judge. But we have examined the evidence on this question, and see no sufficient reason for a further reduction.

The judgment is affirmed.

HADLEY, C. J., and CROW, RUDKIN, and DUNBAR, JJ., concur. MOUNT and ROOT, JJ., took no part.

ATLANTA & W. P. R. CO. *v.* CAMP.

(Supreme Court of Georgia, Jan. 31, 1908.)

[60 S. E. Rep. 177.]

Railroads—Location of Stations—Contract to Locate—Duty to Public.—Where, for the purpose of increasing its earning opportunities, a railroad company adopts the policy of offering inducements to procure settlers along its line; and where, in contemplation of such policy, a prospective settler, A., and the railroad company, B., negotiate, A. proposing to purchase certain land along the line of road, if B. will establish and maintain, during the life of its charter, a station at a point near the land, and B. responding that it will establish and maintain during the life of its charter a station at a point near the land, and put into effect a schedule under which two trains will stop at the station from each direction daily, if A. will purchase the land, and where, induced by such negotiations, the land is purchased by A., and, in pursuance of the same negotiations, B. establishes the station and maintains the schedule, such negotiations and actions thereunder are sufficient to constitute a contract binding B. for the maintenance of the station and schedule, except as qualified by the ruling announced in the second headnote, and sufficient to give a right of action to A. for damages resulting from a breach.

Same.*—The contract by a railroad company to locate a station at a given point is not per se void. Such a contract is enforceable against the railroad company so long as it is possible for the company to discharge the duties owed by it to the public, and, at the same time, discharge the duties incumbent upon it by the contract. Whenever a time arrives that the company is hampered in the discharge of its duties to the public, by its undertaking under the contract to establish the station, the station may be abandoned, notwithstanding

*For the authorities in this series on the subject of the obligations and liabilities of railroad companies under contracts by which they agree to locate and maintain stations or depots at certain points, see foot-notes appended to *St. Louis, etc., R. Co. v. Crandall* (Ark.), 15 R. R. R. 837, 38 Am. & Eng. R. Cas., N. S., 837; foot-notes appended to *Reeser v. Philadelphia & R. Ry. Co.* (Pa.), 21 R. R. R. 333, 44 Am. & Eng. R. Cas., N. S., 333.

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the contract, as it is to be presumed that the parties to the contract entered into the same with full knowledge of the duty of the railroad company to subordinate private interests under contracts made by it to the public rights, whenever there is a conflict between the same. But, in a given case, it is incumbent upon a railroad company, before it could be discharged from a contract to locate a station, to establish satisfactorily that there has arisen such a conflict between its public duties on the one hand and its duties under the contract on the other that it is impossible for it to discharge the former without entirely abandoning the latter.

Writ of Error—Review—Discretion of Court—Ruling on Petition.—A judgment of a trial judge, holding that a petition has been framed in compliance with the pleading act of 1893 (Civ. Code 1895, § 4961, p. 56), requiring all petitioners to "set forth the cause of action in orderly and distinct paragraphs, numbered consecutively," will not be reversed unless it is apparent that there has been an utter disregard of the provisions of the act.

(Syllabus by the Court.)

Error from Superior Court, Campbell County; L. S. Roan, Judge.

Action by H. H. Camp against the Atlanta & West Point Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Dorsey, Brewster, Howell & Heyman, for plaintiff in error.
J. F. Golightly, for defendant in error.

ATKINSON, J. 1. In the plaintiff's petition it is alleged that the defendant was one among a number of competing railroad companies for through travel and local business over its line of railway; that, for the advancement of its interests in that behalf, the defendant entered upon the policy of encouraging settlers along its line of railroad who would beautify their homes; that petitioner did not live on the defendant's road, but was in search for a place to settle and advised the defendant of his object. The defendant then informed petitioner that, if petitioner would invest in a home on its line of road and beautify the same, the defendant would offer inducements. Afterwards petitioner ascertained that a certain tract of land on the line of defendant's road was for sale; that petitioner then proposed to defendant that he would purchase said tract of land, provided the defendant would locate thereon a permanent station, to continue during the life of the charter of the company. In response the defendant informed petitioner that, if petitioner would purchase the property, defendant would locate the station as suggested, and would commence by causing two trains per day in each direction to stop at the station, and that from time to time thereafter the number

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of trains would be increased. Upon the faith of the defendant's proposition to locate the station and stop the trains as already recited, petitioner knowing the effect thereof would be to enhance the value of the property, purchased the property and erected thereon a dwelling house at a cost of \$4,000. The defendant immediately established a station in pursuance of its promise and called it "Camp's," and put into effect a schedule requiring two of its trains in each direction to stop at the station on each day. This schedule was continued for several years. It was also alleged that, in order to carry out the plaintiff's contract with the defendant, the plaintiff, after building the dwelling house, made other improvements, which were specified, but not necessary here to state, all of which tended to beautify his home and render the view from the railroad attractive, and to carry out the defendant's policy, to which reference has already been made. After maintaining the station and schedules hereinbefore recited for several years, the defendant wrongfully, without the consent of the plaintiff, abandoned the same. The effect of the abandonment was greatly to depreciate the market value of the plaintiff's property. The suit was for damages for breach of the contract. The plaintiff's entire negotiations were with one alleged to be the industrial agent of the defendant, who it was alleged had authority to bind the defendant in making a contract of the character alleged. It was further alleged that after the negotiations between the plaintiff and the defendant, relied upon as showing the agreement which induced the plaintiff to purchase and improve the property, the defendant ratified all of the promises made in its behalf, and, in pursuance of its promises, established the station and put into effect the schedules for the stop at such station of two trains per day going in each direction, as promised by the agent.

The allegations were sufficient to show an obligation upon the part of the defendant to establish a station at a point near the property purchased by the plaintiff, and to cause as many as two trains per day, going in each direction, to stop at such station after it was established. The point is made that the plaintiff only proposed that he would buy land in which the defendant had no interest, if the defendant would establish the station, and that the defendant did not accept the proposition, but submitted a counter proposition that it would establish the station and maintain a given schedule, if the plaintiff would buy the property. In other words, that both parties spoke conditionally, and no agreement to do anything was actually made. The petition as a whole is entitled to a broader interpretation. The allegations are sufficient to show that the parties did more than merely submit the propositions. They understood each other, and, while their propositions were pending, both proceeded to

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perform in execution of their understanding. Performance by each was acceptance of the other's proposition. Such acceptance eliminated all conditional features connected with the transaction, rendered certain the intention of the parties, introduced the feature of mutuality, showed the presence of consideration moving each party, showed ratification by the railroad company, and rendered it unnecessary to reduce the contract to writing. In connection with these announcements, it may be noted that the facts in *Swan Oil Co. v. Linder*, 123 Ga. 554, 51 S. E. 622, present a different case from that under consideration. The case at bar is more like the case of *McCaw Mfg. Co. v. Felder*, 115 Ga. 408, 41 S. E. 664, and the principles therein announced are applicable here. *McCaw Mfg. Co. v. Felder* was differentiated from *Swan Oil Co. v. Linder* in the opinion of the latter case. With regard to the matter of consideration, it may be further said: Adequacy or inadequacy of consideration is a subject to be considered by the parties at the time they make the contract. There is no law regulating the amount of consideration necessary to support a particular promise. If the parties have the capacity to contract and there is no fraud or misplaced confidence, and there is any valuable consideration, the courts will enforce the contract according to its terms. Under the allegations the defendant anticipated an increase of business resulting from the location of settlers along its line of road. While such increase resulting from the purchase by the plaintiff of a single tract of land and his settlement thereon, might be inappreciable, it was one of many transactions in contemplation of the defendant, which, if its plan were developed, would tend ultimately to bring about the desired result; that is to say, the increase of its business as a common carrier.

2. It is said, though, that the contract to locate the station and maintain it permanently was contrary to public policy and unenforceable. The question as to how far a railroad company can bind itself in a contract to locate a station at a given point has been the subject of numerous adjudications. There are rulings to the effect that an agreement by a railroad company to locate and maintain a station at a given point is contrary to the policy of the law. *Enid Right of Way & Townsite Co. v. Lile*, 15 Okl. 328, 82 Pac. 810; *Pacific Railroad Co. v. Seely*, 45 Mo. 212, 100 Am. Dec. 369; *Mobile & Ohio Railroad Co. v. People*, 132 Ill. 559, 24 N. E. 643, 22 Am. St. Rep. 556. In these cases and in others that may be cited the broad rule is laid down that a railroad company has no authority to bargain away its right to locate stations in such manner as the public interests may require, and, that any contract locating a station being in its nature something which might have the effect to hamper the company in the discharge of its duties to the public, every contract

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having for its purpose the permanent location of a station is by its very terms contrary to the policy of the law and unenforceable. This broad rule, however, has not met with general favor. There are also numerous rulings to the effect that a contract by a railroad company to locate a station at a given point, and not to locate any other stations within a given distance from that point, is contrary to public policy and void. *Marsh v. Fairbury & N. W. Ry. Co.*, 64 Ill. 414, 16 Am. Rep. 564; 26 Am. & E. Enc. L. (2d Ed.) 500; *Williamson v. Chicago, R. I. & P. R. Co.*, 53 Iowa, 126, 4 N. W. 870, 36 Am. Rep. 206; *St. Joseph & Denver City R. Co. v. Ryan*, 11 Kan. 602, 15 Am. Rep. 357; *Beasley v. Texas & P. R. Co.*, 115 Fed. 952, 53 C. C. A. 434. The authors of *Elliott on Railroads*, after referring to the decisions which hold that the contracts requiring a railroad company to establish depots at certain points are against public policy and not enforceable, say that there is a conflict of authority upon the question, and complete their discussion of the matter in the following language: "In our opinion such a contract may be made if no public interest is prejudiced. If the contract is made solely to promote private interests at the expense of the public welfare, the contract should, as we think, be held to be illegal. But, if the public interests are not prejudiced, or the power of the company to do what the public welfare requires is not abridged, we believe the contract should be regarded as valid. Many cases hold that a railroad corporation may contract for the erection and maintenance of a station at a certain point, where its right to maintain stations at other points is not thereby impaired. This we believe to be the sound doctrine." 2 *Elliott on Railroads*, §§ 362, 386. Sound public policy requires that a railroad company should be left free to establish and re-establish its stations wherever the accommodations or the wants of the public may require. The power to locate stations is from its very nature a continuing one. *Mobile & Ohio R. Co. v. Temple*, 132 Ill. 559, 24 N. E. 643, 22 Am. St. Rep. 556. The authorities of a railroad have unlimited power to locate their stations for the best interests of the community and the road, even though a money consideration be paid therefor. *Currie v. N. J. & C. R. Co.*, 61 Miss. 725. An agreement on the part of a railroad company to establish a station at a particular point is not one to keep it there forever, but is made subject to the general contingencies of business, the public interest, and the large modifications and growth of transportation routes as they may affect the requirements of the railroad company's business. *Texas & P. Ry. Co. v. Scott*, 41 U. S. App. 624, 77 Fed. 726, 23 C. C. A. 424, 37 L. R. A. 94. In the case just cited it was held that an agreement by a railroad company, in consideration of a right of way, to establish a depot on the land, is complied

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with by establishing the station and maintaining it upon the land for 36 years, although the depot is then removed on account of the exigencies of business, and in the opinion Judge Newman cites the case of *Texas & P. R. Co. v. Marshall*, 136 U. S. 393, 10 Sup. Ct. 846, 34 L. Ed. 385, where it was held that an agreement to locate and maintain the shops of a railroad company permanently at a given point was complied with by the maintenance of the shops at that point for six years, notwithstanding a subsequent removal growing out of the exigencies of the business of the railroad and the changes necessary to be made to discharge the public duties resting upon it, and it was held that the word "permanent" in the contract was to be construed with reference to the subject-matter of the contract, and that under the circumstances the contract with the word "permanent" therein was complied with by the establishment of the terminus and office and shops contracted for, with no intention of removing or abandoning them at the time when so established.

The effect of the rule laid down in the decisions just referred to is that, when one contracts with a railroad company in reference to those matters where the public is involved, the contract is made subject to the rights of the public, and, when the exigencies of the business of the company are such that the rights of the public come in conflict with the rights of the contracting party under his contract, it is to be presumed that it was the intention of the parties that the private rights under the contract should yield to the public right. In applying what has been said to the present case, it cannot be held that the contract between the railroad company and the plaintiff was void per se, for the company had the right to make a contract with the plaintiff to locate a station at a given point, so long as the location of the station did not interfere with the proper discharge of the duties resting upon the company as a quasi public corporation; but the plaintiff was charged with notice of the character of the person he was contracting with and of the duties which that person owed to the public, and also, in reference to the subject-matter of the contract, that it was connected intimately and directly with the discharge of the duties the defendant owed the public, and therefore it became a part of the contract between the parties that the maintenance of the station at the point was limited, not by the time specified in the contract, but to that time, and to that time only, when, consistent with the discharge of the public duties of the company, the station could be maintained in the manner provided for in the agreement. The petition therefore set forth a cause of action. There is nothing alleged to indicate that the conditions are so changed that the railroad company cannot comply with its contract, and at the same time discharge all du-

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ties to the public which the law places upon it. If that time has arrived the railroad company may be allowed to show this by an appropriate plea, supported by competent evidence. This is a matter of defense. The question with which we have dealt in the present case has never been directly passed upon in any case decided by this court, but cases involving contracts for the location of depots, stations, lines of road, etc., have been before this court where other phases of the law were involved, and in some of them contracts of the character above indicated have been tacitly recognized as being valid. See *A. & W. P. R. Co. v. Hodnett*, 36 Ga. 669; *A. & W. P. R. Co. v. Speer*, 32 Ga. 550, 79 Am. Dec. 305; *A. & W. P. R. Co. v. Hopson*, 33 Ga. 116; *Haisten v. S., G. & N. A. R. Co.*, 51 Ga. 199; *Ga. So. R. v. Reeves*, 64 Ga. 492; *Butler v. Tifton Ry. Co.*, 121 Ga. 817, 49 S. E. 763.

3. The demurrer also raised the objection that the petition was not paragraphed in the manner required by law. While we think that some of the paragraphs of the petition were capable of subdivision, we cannot say that there has been such a disregard of the provisions of the act that the judge erred in upholding the petition as framed. As was said in *Atlanta, K. & N. Ry. Co. v. Smith*, 119 Ga. 668, 46 S. E. 853: "It is impossible to satisfactorily define what would be orderly paragraph, and this matter must be left largely to the discretion of the trial judge." See, also, *Atlantic Coast Line Ry. Co. v. Taylor*, 125 Ga. 454, 54 S. E. 622.

Judgment affirmed. All the Justices concur, except HOLDEN, J., not presiding.

UNION DEPOT & RY. CO. *v.* MEEKING *et al.*

(Supreme Court of Colorado, Feb. 3, 1908.)

[94 Pac. Rep. 16.]

Carriers—Regulation of Station Grounds—Discrimination as to Hackmen.*—A railroad or depot company owning a strip of land at a passenger station for the accommodation of travelers on railroads may lawfully exclude some hackmen or carriers of baggage from using it as a hack stand for the purpose of plying their vocation, while it gives to others permission to do so; they being allowed free access to deliver outgoing and receive incoming passengers.

Error to District Court, City and County of Denver; John I. Mullins, Judge.

Action by Abe Meeking and others against the Union Depot & Railway Company. There was judgment for plaintiffs, and defendant brings error. Reversed.

Wolcott, Vaile & Waterman and *Dorsey & Hodges*, for plaintiff in error.

CAMPBELL, J. The defendant corporation was organized under the laws of this state for the accomplished purpose of acquiring and maintaining in the city of Denver a union depot or passenger station which is situate near the terminal points of several railroads to which defendant furnishes the usual facilities of a depot or passenger station for the accommodation of the traveling public. The plaintiffs are licensed hackmen conducting in this city the business of carrying passengers and baggage for hire, particularly to and from this union depot. About 25 years before the beginning of this action the fire and police board of the city of Denver and defendant's grantor designated a certain strip of land leading from Wynkoop and Seventeenth streets into the union depot as a hack stand, and permitted plaintiffs and other hackmen in the city of Denver to occupy it for such purpose. Shortly before this action was begun plaintiffs were ordered by defendant no longer to occupy this strip of ground as a stand for their hacks, and immediately to vacate the same, and not to enter thereon to receive or discharge passengers destined to, or leaving, the union depot. In the complaint in which the foregoing facts are alleged plaintiffs say that

*See foot-note appended to *Hedding v. Gallagher* (N. H.), 12 R. R. R. 91, 35 Am. & Eng. R. Cas., N. S., 91, where all the preceding authorities in this series on the subject are collected; *Donovan v. Pennsylvania Co.* (U. S.), 21 R. R. R. 696, 44 Am. & Eng. R. Cas., N. S., 696.

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this strip of ground is a part of the public highway, and belongs to the city and county of Denver, and the defendant has no control over, or interest in, it. It is further averred that if defendant carries out its threats to exclude plaintiffs therefrom while awaiting the arrival of travelers, or ejects them from these premises, or impedes or annoys them in the conduct of their business as they have theretofore conducted it for a long time, they and the public at large, particularly such portion of the public as are from time to time traveling on trains running into the depot, will suffer great loss, inconvenience, and damage which is incapable of being estimated. Therefore they pray for an injunction to restrain defendant from excluding them from occupying the premises, or ejecting them therefrom, or preventing them from using the same as they had theretofore been accustomed to do. Defendant filed an answer, and plaintiffs a replication, and upon issues thus joined hearing was by the court without a jury. Special findings of fact were made from which the court concluded that the equities were with plaintiffs, and upon such findings rendered a decree enjoining defendant from discriminating against plaintiffs in favor of a corporation to which defendant had granted the privilege, which plaintiffs claimed as a legal right, of entering upon defendant's grounds and there soliciting patronage.

It would seem that the case as made by the complaint was not, in all respects, proved by the evidence or upheld by the findings. No objection was made by defendant at the trial to the departure, and no error is assigned or argued to the variance between the allegations of the complaint and the proofs. Both parties apparently consented to have the law applied to the facts as found by the court, though they are not the facts which the plaintiffs allege in their complaint as their cause of action. We mention this, not because our decision is in any way affected by it, but as a reminder that we have not overlooked it.

We proceed, therefore, to dispose of the cause on the special findings of fact. So far as they are material to the question of law involved, these findings are that this strip of land which plaintiffs and other hackmen have for a long time been accustomed to use as a hack stand, and from which the complaint alleges that defendant has ordered them to withdraw, and threatened to eject them from the same if they occupied it, is not, as the complaint alleges, a public highway, but, as the answer says, the private property of defendant. There was a finding that the chief of police of the city of Denver, with the license and consent of defendant's grantor, designated this strip as a hack stand, and that it had been so used by plaintiffs and others in the conduct of their business in carrying passengers to and from the depot, and that defendant had notified the hackmen,

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including plaintiffs, that they could no longer use this strip of land for the purpose of a hack stand, or to solicit patronage thereon. The important finding of fact, on which it based the decree, was stated by the court in the following language: "The court further finds that the defendant, the Union Depot & Railway Company, has entered into a certain contract between itself, the defendant company, and the Denver Omnibus & Cab Company, conferring upon and granting to the said the Denver Omnibus & Cab Company the exclusive privilege of entering with its hacks upon the grounds of the defendant company, and using the same and particularly the strip of land above referred to for the purpose of carrying on its business as an omnibus and cab company, and there soliciting the patronage of incoming passengers, to the exclusion of the plaintiffs from the right to a similar entry upon, and use of the premises of, the said defendant company." The court also made a finding—which seems to be a conclusion rather of law—that the exclusive right to solicit business from incoming passengers, and standing their hacks or vehicles on this strip of land, would give to the one who enjoyed the same an advantage over other hackmen or busmen who were excluded therefrom, and that such exclusive contract operated as a discrimination in favor of the Denver Omnibus & Cab Company against the plaintiffs, and tended to create a monopoly in its favor. It was upon this supposed unlawful discrimination against plaintiffs in favor of the cab company, to which the exclusive privilege was given, that the court concluded as a matter of law that the equities were with plaintiff, and rendered a decree prohibiting defendant company from enforcing the contract that purported to confer the privilege. The finding above quoted may be ambiguous, since it might be inferred therefrom that the purpose of defendant was to exclude plaintiffs from entering upon the depot grounds, or into the passenger station, while engaged in carrying passengers and baggage to and from the same. The answer, however, expressly denies that such was its purpose or intention, and there is an express averment therein that plaintiffs and each of them were notified that they might at all reasonable hours and times enter the depot and upon the depot grounds as the agents or representatives of persons whom they, or any of them, had contracted to deliver at, or carry from, the depot. The finding evidently meant that defendant's purpose was and is to prevent plaintiffs from using its grounds as a place for standing their vehicles, or as a place whereon to solicit patronage, while it conferred upon, and granted such rights to, the Denver Omnibus & Cab Company.

But we think the court did not intend to find that defendant had ordered, or threatened to order, plaintiffs not to enter upon its premises to deliver or receive passengers. The plaintiffs made

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such an allegation in the complaint, but they produced no evidence whatever to prove it, while defendant's superintendent positively testified that no such order of exclusion had ever been made or threatened, but, on the contrary, plaintiffs were specifically told they might enter upon its premises freely at all reasonable hours both to receive incoming, and to deliver outgoing, passengers. And that this is so becomes plain when it is considered that there is no clause in the decree which restrains defendant from refusing plaintiffs free access to its grounds to carry passengers to and fro, obviously because there was no evidence that such was its intention, while the only acts it is enjoined from doing are such as tend to obstruct plaintiffs in their claim of right to use the designated strip of land as a hack stand, and as a place where they might freely ply their vocation. The question of the right of plaintiffs to free access to the depot for taking thereto departing, or receiving arriving, passengers with whom plaintiffs might have a contract of carriage, is not in this case. Such right is not questioned, but directly recognized, by defendant.

The vital question, then, in the case, and the only one determined below, may thus be stated: May defendant lawfully permit the Denver Omnibus & Cab Company to have the sole right to stand, and solicit patronage, upon the premises of the defendant, and exclude all other hackmen from standing and soliciting thereon? The question is one of first impression in this jurisdiction. It has been ruled differently by different courts. Some of the earlier cases, apparently based upon the ruling of the Supreme Court of New Hampshire in *Markham v. Brown*, 8 N. H. 523, 31 Apr. Dec. 209, hold that such a contract as that which the defendant here made with the Denver Omnibus & Cab Company, and the purpose of defendant to exclude plaintiffs from soliciting patronage in or upon the depot building and grounds, are in violation of the legal rights of plaintiffs, and in disregard of the supposed public duty of a railroad or depot company to furnish equal facilities to all having business with it. The later and better reasoned cases hold that as the owner of property, in the exercise of his dominion over it, may invite one to enter upon and occupy it and exclude all others, so a railroad or depot company owning a passenger station or depot for the accommodation of travelers upon railroads may lawfully exclude some hackmen or carriers of baggage from entering thereon for the purpose of there plying their vocation, while it gives to others permission so to do. The Supreme Court of New Hampshire, though at first holding that such public corporations might not thus exclude common carriers from its premises, or discriminate in favor of one, in a late case (*Hedding v. Gallagher*, 72 N. H. 377, 57 Atl. 225, 64 L. R. A. 811), has taken the opposite

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view, and in an instructive opinion by Walker, J., has reviewed the leading authorities pro and con, and settled the law for that state in favor of such action as the depot company here is charged with. After the decree of the lower court was entered herein, the precise question which is now before us was decided in *Donovan v. Penn. Co.*, 199 U. S. 279, 26 Sup. Ct. 91, 50 L. Ed. 192, in a writ of certiorari to the judgment of the United States Circuit court of Appeals for the Seventh Circuit, the opinion in which is reported in 120 Fed. 215, 57 C. C. A. 362, 61 L. R. A. 140. We forbear citing other authorities which sustain our conclusion, since in the opinions of the courts in these cases just referred to all of the cases upon this subject are collated, and many of them are exhaustively reviewed. The opinion of Mr. Justice Harlan of the Supreme Court of the United States is so entirely in point and conclusive upon every feature of the case in hand that it would be presumptuous upon our part to enter upon an independent discussion of the law of the case. The decision of that august tribunal is controlling with us, not merely because of the reasoning of the opinion, but because the question determined is the same there as here. The entire opinion is pertinent, but one or two excerpts will show the grounds for the decision. In answer to the argument of counsel for the excluded hackmen, based upon the public functions and duties of railroad companies which are said to forbid them to discriminate in favor of one hackman against another, and after stating that a railroad or depot company must devote its property primarily to public use to the extent necessary for the public objects intended to be accomplished by the construction and maintenance of the railroad as a highway, the court said: "It by no means follows, however, that the company may not establish such reasonable rules, in respect of the use of its property, as the public convenience and its interests may suggest, provided only that such rules are consistent with the ends for which the corporation was created, and not inconsistent with public regulations legally established for the conduct of its business. Although its functions are public in their nature, the company holds the legal title to the property which it has undertaken to employ in the discharge of those functions. And, as incident to ownership, it may use the property for the purposes of making profit for itself; such use, however, being always subject to the condition that the property must be devoted primarily to public objects, without discrimination among passengers and shippers, and not be so managed as to defeat those objects. It is required, under all circumstances, to do what may be reasonably necessary and suitable for the accommodation of passengers and shippers. But it is under no obligation to refrain from using its property to the best advantage of the public and of itself. It is not bound

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to so use its property that others, having no business with it, may make profit to themselves. Its property is to be deemed, in every legal sense, private property as between it and those of the general public who have no occasion to use it for purposes of transportation. * * * Applying these principles to the case before us, it would seem to be clear that the Pennsylvania Company had the right—if it was not its legal duty—to erect and maintain a passenger station and depot buildings in Chicago for the accommodation of passengers and shippers as well as for its own benefit; and that it was its duty to manage that station so as to subserve primarily the convenience, comfort, and safety of passengers and the wants of shippers. It was therefore its duty to see to it that passengers were not annoyed, disturbed, or obstructed in the use either of its station house or of the grounds over which such passengers, whether arriving or departing, would pass. It was to that end—primarily as we may assume from the record—that the Pennsylvania Company made an arrangement with a single company to supply all vehicles necessary for passengers. We cannot say that that arrangement was either unnecessary, unreasonable, or arbitrary. On the contrary, it is easy to see how, in a great city and in a constantly crowded railway station, such an arrangement might promote the comfort and convenience of passengers arriving and departing, as well as the efficient conduct of the company's business."

There was no finding here that defendant's arrangement with the cab company was inadequate for the accommodation of passengers arriving at, or departing from, the union depot, and there is nothing in the record to show that it was. Neither was there any such showing in the Donovan Case, *supra*, but Mr. Justice Harlan, in response to the argument of counsel for the complaining hackmen in that case that the traveling public were inconvenienced by a similar arrangement, and this constituted a part of their grievance against the railway company, said, what is pertinent to the precise contention of the hackmen here, as well as to the particular argument there: "The record does not show that the arrangement referred to was inadequate for the accommodation of passengers. But if inadequate, or if the transfer company was allowed to charge exorbitant prices, it was for passengers to complain of neglect of duty by the railroad company, and for the constituted authorities to take steps to compel the company to perform its public functions with due regard to the rights of passengers. The question of any failure of the company to properly care for the convenience of passengers was not one that, in any legal aspect, concerned the defendants as licensed hackmen and cabmen. It was not for them to vindicate the rights of passengers. They only sought to use the property of the railroad company to make profit in the prose-

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cution of their particular business. A hackman, in no wise connected with the railroad company, cannot of right and against the objections of the company go upon its grounds or into its station or cars for the purpose simply of soliciting the custom of passengers; but, of course, a passenger upon arriving at the station, in whatever vehicle, is entitled to have such facilities for his entering the company's depot as may be necessary."

The judgment of the district court being in conflict with the conclusion which we have reached, it is reversed, and the cause remanded, with instructions to the district court to vacate the decree heretofore rendered and dismiss the action.

Reversed.

STEELE, C. J., and GABBERT, J., concur.

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(Supreme Court of Utah, Feb. 17, 1908.)

[94 Pac. Rep. 10.]

Carriers—Rights of Hackmen on Depot Grounds—Constitutional Provisions.—Const. art. 12, § 12, declaring all railroad and other transportation companies common carriers and subject to legislative control, and that such companies shall receive and transport each other's passengers and freight without discrimination or unnecessary delay, even if applying to drivers of cabs, hacks, and express wagons, does not confer on such persons the right to enter on a railroad company's depot grounds to solicit business, or prevent a railroad company inhibiting the soliciting of business on its grounds, except by one concern operating carriages.

Same.—Monopolies.*—It being conceded that a railroad company may exclude all persons from going on its depot grounds to solicit business, the granting by the railroad company to one concern operating carriages the exclusive privilege of soliciting business thereon gives others no right to do so, even if such exclusive privilege be void as creating a monopoly, and though the grantee thereof be not excluded.

Same.*—A railroad may, subject only to regulation by the state, in the interest of the public, as to fares to be charged and service to be furnished, prohibit all but one carriage concern soliciting on its depot grounds the carriage therefrom of passengers and their baggage.

Appeal from District Court, Third District; C. W. Morse, Judge.

Action by the Oregon Short Line Railroad Company against

*See preceding case, and foot-note.

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F. T. Davidson and others. Judgment for plaintiff. Defendants appeal. Affirmed.

Powers & Marionaux, for appellants.

P. L. Williams and George H. Smith, for respondent.

FRICK, J. This is an action for equitable relief by injunction. The attorneys for the respective parties have agreed upon the facts, which, briefly stated, are as follows: The respondent is a corporation owning and operating a railroad, and, in connection therewith, maintains and conducts a depot and depot grounds in Salt Lake City. Its trains and those of the S. P., L. A. & S. L. Railway Company arrive at and depart from said depot, at and from which several hundred passengers arrive and depart daily. A portion of the depot grounds is fenced off, with a street entrance thereto through a gate. The fenced-off portion has platforms and other conveniences for the accommodation of passengers arriving or departing on the trains; also conveniences for cabs, carriages, and other vehicles engaged in the business of transporting passengers and baggage to and from said trains. The respondent permits all persons to enter the fenced-off portion of said grounds and to have access to the arriving or departing trains, if such persons have been engaged to meet incoming, or to deliver baggage or set down outgoing, passengers at the trains, but requires all such persons to leave the inclosure as soon as they have received such persons or baggage from, or after delivering the baggage or passengers at, the trains. Respondent claims that, in order to provide reliable means of conveyance to passengers arriving or departing on its trains and the trains of the other railroad company referred to, it has entered into an agreement and arrangement with a reliable company owning and operating good and suitable carriages and other vehicles which are run between said depot and all points in Salt Lake City; that by virtue of said arrangement said company has the exclusive privilege of entrance into the inclosure, the right of access to the platforms and conveniences erected and maintained in said inclosure, and the right to solicit custom or patronage of, and to render services to, arriving and departing passengers at, or to deliver them to, the trains. The appellants are all engaged in the business of running hacks, cabs, wagons, and other vehicles suitable and used for transporting passengers and baggage in Salt Lake City and to and from respondent's depot. Notwithstanding the fact that respondent repeatedly has forbidden the appellants to enter the portion of the depot grounds fenced-off as above stated, for the purpose of soliciting patronage, they have entered the same, and insist upon the right of doing so, and will, unless restrained, continue to do so. Upon substantially the foregoing facts the district court entered judgment enjoining

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appellants from entering said inclosure and from soliciting patronage at said platform and in said grounds, but permitted them to take passengers and their baggage into said inclosure and receive them and their baggage from said trains when especially employed in advance for that purpose by such passengers. The appellants insist that the court erred in its conclusion of law, and that the judgment should have been in favor of appellants.

The claim of appellants, as stated by their counsel in their brief, in substance is as follows: "The appellants concede the right of the plaintiff [respondent] to exclude all persons from its depot grounds who are there for the purpose of soliciting business, but insist that the respondent cannot admit one common carrier to its grounds and allow it to solicit business, and exclude all other common carriers; that when it permits * * * one common carrier to enter its depot grounds and range its carriages along the platforms * * * that the gate is opened to all carriers of passengers who desire to enter the grounds." To do otherwise, it is asserted, would create a monopoly, and would allow the respondent to control the transportation of passengers beyond its own railroad, and, in effect, dictate to them whom they should employ in being transferred to other depots, or in being transported from the depot to the different points in Salt Lake City. Upon the other hand, counsel for respondent assert that the appellants cannot, as a matter of right, enter its depot or upon its grounds, or have access to its trains, for the purpose of soliciting custom or patronage; that to do this is a privilege merely, which may be granted to one and withheld from another at the pleasure of the respondent; that the respondent may regulate and control the matter of carrying on or soliciting business in its depot or upon its grounds, and in and about its trains, and to that end may permit one or more persons to have access thereto and exclude all others therefrom, except when such other persons come there as prospective passengers, or for the purpose of transacting business with it, or at the request of persons to either receive them at or take them to the trains of the respondent, or to and from the trains of any other railroad company that may be using respondent's tracks, depot, and depot grounds. Appellants, in part at least, base their claim upon section 12 of article 12 of the Constitution of this state, which is as follows: "All railroad and other transportation companies are declared to be common carriers, and subject to legislative control; and such companies shall receive and transport each other's passengers and freight without discrimination or unnecessary delay."

It is, to say the least, quite doubtful whether this provision was intended to include, or in fact includes, cabdrivers, hackmen, and expressmen. The provision refers to other transpor-

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tation companies to be sure, but it requires only that such transportation companies receive and transport each other's passengers and freight without discrimination or unnecessary delay; that is, those companies must not favor their own passengers or show favoritism to their own shippers over those passengers or shippers of freight coming from other companies. This falls far short of conferring a right upon one common carrier to enter upon and use the property of another common carrier for the purpose of soliciting custom to build up his own business. This provision was not intended as a prohibition upon a common carrier to promulgate and enforce reasonable rules and regulations respecting the conduct of his own business. This does not prevent him from protecting his passengers from undue annoyance and interference while they are on his premises by others who may desire to solicit the business and patronage of such passengers. Neither does it prevent the common carrier from providing means by which a passenger may make arrangements for the transportation of either himself or his property beyond the end of the carrier's railroad. To attain this end the carrier may arrange for all necessary and convenient terminal facilities to accommodate both incoming and outgoing passengers. One carrier is not required to provide space or facilities upon his own property for other carriers, though which they may increase and build up their own business. The question has often been before the courts, and has been thoroughly considered and discussed, both in this country and in England; and, as might well be expected, the courts are not in harmony. Some of the American courts substantially hold that, while the common carrier may promulgate and enforce reasonable rules and regulations with regard to the matter now under consideration and may exclude all persons from entering upon his property who come there for the purpose of soliciting patronage or business, nevertheless he may not grant the privilege to do this to one and exclude all others. In other words, he must either exclude all or admit all. While the different courts assign various reasons for these holdings, the one generally relied upon is that to permit a common carrier to select one carrier from all others and grant him the exclusive privilege tends to build up a monopoly and to destroy competition, which is against public policy. The foregoing doctrine is supported by the following cases: *Hack & Bus Co. v. Sootsma*, 84 Mich. 194, 47 N. W. 667, 10 L. R. A. 819, 22 Am St. Rep. 693; *Montana Union Ry. Co. v. Langlois*, 9 Mont. 419, 24 Pac. 209, 8 L. R. A. 753, 18 Am. St. Rep. 745; *Cravens v. Rogers*, 101 Mo. 249, 14 S. W. 106; *Indianapolis Union Ry. Co. v. Dohm*, 153 Ind. 10, 53 N. E. 937, 45 L. R. A. 427, 74 Am. St. Rep. 274; *State v. Reed*, 76 Miss. 211, 24 South. 308, 43 L. R. A. 134, 71 Am. St. Rep. 528; *McConnell v. Pedigo*, 92 Ky. 465, 18 S. W. 15.

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The following cases cited by appellants, and also sometimes cited as authorities in some of the foregoing cases, do not directly pass upon the question presented by appellants: *Lucas v. Herbert*, 148 Ind. 64, 47 N. E. 146, 37 L. R. A. 376; *New England Exp. Co. v. Maine Cent. Ry. Co.*, 57 Me. 188, 2 Am. Rep. 31; *Sanford v. Railway Co.*, 24 Pa. 378, 64 Am. Dec. 667; *Pennsylvania Ry. Co. v. City of Chicago*, 181 Ill. 289, 54 N. E. 825, 53 L. R. A. 223; *Lindsay v. Anniston*, 104 Ala. 257, 16 South. 545, 27 L. R. A. 436, 53 Am. St. Rep. 44; *Marriott v. London & S. W. Ry. Co.*, 1 C. B. (N. S.) 489. The doctrine announced in 57 Me. 188, 2 Am. Rep. 31, and in 24 Pa. 378, 64 Am. Dec. 667, has long since been abandoned. In those cases it was held that one common carrier was legally required to carry another common carrier, although such other carrier desired to carry on an independent business on the property of the first carrier. This doctrine was exploded by the Supreme Court of the United States in the *Express Cases*, 117 U. S. 1, 6 Sup. Ct. 542, 29 L. Ed. 791, where the true distinction is pointed out with regard to persons who desire to be carried as passengers or shippers of freight, and such as desire to be transported for the purpose of transacting or of carrying on an independent business with the public upon the property or trains of a common carrier. A common carrier need not provide facilities for others to do business, but must transport them and their property and provide reasonable facilities to do this.

The following American cases support the doctrine that a common carrier may grant an exclusive privilege to one and exclude all others who desire to upon his premises for the sole purpose of soliciting custom or business: *Old Colony Ry. Co. v. Tripp*, 147 Mass. 35, 17 N. E. 89, 9 Am. St. Rep. 661 (by a divided court); *Boston A. R. Co. v. Brown*, 177 Mass. 65, 58 N. E. 189, 52 L. R. A. 418, 19 A. & E. R. R. Cases (N. S.) 304; *Boston & M. R. R. v. Sullivan*, 177 Mass. 230, 58 N. E. 489, 83 Am. St. Rep. 275, 20 A. & E. R. R. Cases (N. S.) 356; *Barney v. O. B. & H. Steamboat Co.*, 67 N. Y. 301, 23 Am. Rep. 115; *Fluker v. Georgia R. & B. Co.*, 81 Ga. 461, 8 S. E. 529, 2 L. R. A. 843, 12 Am. St. Rep. 328; *Kates v. Atlanta Baggage & Cab Co. (Ga.)* 16 A. & E. R. R. Cases (N. S.) 140; *New York, N. H. & H. R. Co. v. Bork*, 23 R. I. 218, 49 Atl. 965, 22 A. & E. R. R. Cases (N. S.) 511; *Hedding v. Gallagher*, 72 N. H. 377, 57 Atl. 225, 64 L. R. A. 811, 35 A. & E. R. R. Cases (N. S.) 91; *Donovan v. Pennsylvania Co.*, 120 Fed. 215, 57 C. C. A. 362, 61 L. R. A. 140; *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 26 Sup. Ct. 91, 50 L. Ed. 192; *Barney v. Martin*, 2 Fed. Cas. 892, No. 1,030; *Norfolk & W. Ry. Co. v. Old Dominion Baggage Transf. Co.*, 99 Va. 111, 37 S. E. 784, 50 L. R. A. 722; *State v. Union Depot Co.*, 71 Ohio, 379, 73 N. E. 633, 68 L. R. A. 792; *Brown v. New York & H. R. Ry. Co.*, 75 Hun. 357, 27

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N. Y. Supp. 69. The following English cases also support respondent's contention: *Perth Gen. Station Committee v. Ross*, 8 Am. & Eng. R. Cases (N. S.) 639; *Bedell v. Eastern C. Ry. Co.*, 2 C. B. (N. S.) 509; *Barker v. Midland Ry. Co.*, 18 C. B. 45.

We have not cited all the cases either pro or con upon the question; but, as those omitted are about equally divided, nothing would be gained either way by citing them. There are but few of the cases which support appellants' contention that enter upon a thorough discussion of the principles involved. Those cases that do discuss it most freely are the ones cited from Montana, Michigan, and the dissenting opinion in the case of *Old Colony Rd. Co. v. Tripp*. Upon the other hand, there are quite a number of courts that support the contention of the respondent which discuss the question both from the standpoint of statutory provisions similar to the one quoted by us from the Constitution, and also in view of the principles of the common law which are applicable. Some of the courts which deny the right of the common carrier to grant exclusive privileges claim the weight of authority to be against the right, while some of those opposed to that view likewise assert that the weight of authority supports their view. From a thorough examination of the cases passing upon the question we have arrived at the conclusion expressed by Mr. Justice Harlan of the Supreme Court of the United States in his opinion rendered in the case of *Donovan v. Pennsylvania Company*, 199 U. S., at page 299, 26 Sup. Ct., at page 96, 50 L. Ed. 192, wherein he says: "There are cases to the contrary; but in our opinion the better view, the one sustained by the clear weight of authority and by sound reason and public policy, is that which we have expressed." This view sustains respondent's contention and supports the judgment of the lower court in this case.

Apart, however, from the number of adjudicated cases either way, let us pause a moment for the purpose of examining the underlying principles involved in the proposition. Let us look at it in the light of reason and logic. Counsel for appellants concede (and this concession is also made by all the authorities cited by them) that the respondent may exclude all persons who desire to come upon its premises for the sole purpose of soliciting custom or business, and may likewise prevent all who come there to transact business with it from soliciting business for themselves. But counsel contend that respondent may not grant the privilege to one to solicit business and refuse it to all others. Counsel, therefore, must concede that no person may go upon respondent's premises to solicit business as matter of right; that to do so is a privilege that the respondent may grant or refuse at pleasure. If this be so, how do the appellants acquire the right to compel the respondent to admit them, or any one of them,

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into its depot or upon its ground for the purpose of soliciting business in their own behalf? Appellants argue that they obtain the right from the fact that the respondent may not discriminate as between applicants in conferring the privilege, and that, if it grants it to one, then it has waived the right to exclude all others and must admit all. This argument seems to be based upon the theory that so long as all are excluded no monopoly is created, but, if all are excluded save one, then a monopoly results in favor of the one who is granted the privilege. Assuming that the respondent may not create a monopoly in this regard, and for that reason the exclusive privilege granted to one is void as against public policy, how does this give the appellants the right to enter upon the respondent's premises for the purpose of soliciting business? Does the granting of an exclusive privilege to one, which, as is contended, is illegal and void, transform what are termed mere privileges into absolute rights? That this transformation takes place is the logical result of appellants' contention. If it be true that respondent may not grant an exclusive privilege, and that to do so is illegal, it does not follow that, if it does this, thereby a mere privilege is transformed into a right. What would legally follow is this: The exclusive privilege granted would confer no legal rights upon the grantee and would not be binding upon the respondent. In other words it would leave the appellants, the person to whom the privilege was granted, and the respondent in the same relative situation they were in before the privilege was granted. The grantee could not enforce the contract, because illegal, and hence could be excluded from respondent's premises at its pleasure; and, since the appellants never had the permission to enter, it necessarily follows that they, too, may be excluded. The mere fact, therefore, that the grantee is not excluded, does not give appellants the legal right to enter.

Appellants further assert that respondent's property used in the business of a common carrier is dedicated to public use, and, as they are likewise engaged in a similar business, they have the right, in the interest of the public, to enter upon property that is so dedicated. No doubt, if either of them has any business with respondent, he may so enter to transact such business. If appellants desire to be carried as passengers, or intend to deliver or receive freight, they may enter upon respondent's premises as a matter of right. All or any one of them may also do this in behalf of another who has business with respondent; but this gives them no legal right to require the respondent to devote any of its property to their use for the purpose of soliciting business for themselves. Suppose the respondent, through its agents, demanded the right to enter upon appellants' vehicles for the purpose of soliciting business in its own behalf, and based this de-

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mand upon the ground that such vehicles were engaged in a public business, in that they were used in the business of common carriers; would its claim be allowed? In what way would this claim differ in principle from the one urged by appellants? Neither can we see how appellants can prevail upon the ground that the public is interested; that to deny to them the right to enter respondent's premises might result in destroying competition, and thus advance the prices the public will be required to pay for the services appellants desire to render to the public; and that it may result in making the service inefficient, if not inadequate. In making this claim appellants overlook the fact that respondent at all times is subject to regulation and control by the state; that it is a public service corporation and thus amendable to regulation. It may be required to provide reasonable conveniences for the public in the conduct of its business. It must treat all alike, and afford all an equal opportunity to transact business, and may not discriminate in its charges for services rendered. If appellants are engaged in a like business, as they claim they are, they are subject to the same regulation and control. Indeed, the state, through its agencies, may fix the charges they may exact for transporting both persons and property to and from the trains of respondent or its depot. These regulations apply to any one to whom the respondent may grant the privilege to enter upon its premises to make arrangements with incoming passengers to either transport them or their baggage and property to any part of the city. The opportunity to do this does not prevent such passengers from engaging any other persons, either in advance of their arrival or after they have arrived, for the purpose of transporting them or their property; nor are they prevented from doing this at or before the time of their departure. If the charge for the service is regulated by law or ordinance, and the facilities of transportation are reasonable and adequate, the public cannot complain. Neither is the respondent required to provide passengers with the opportunity of selecting any one of numerous competitors for their patronage the moment such passengers step from the trains of the respondent. If appellants, as common carriers, have the right to enter upon the premises of respondent to solicit and compete for business, why may not a street car company claim the same right to do so? It, too, may assert that it is in the interest of the public in that it would promote competition.

All these matters are subject to regulation by the state, and we know of no law, nor of any principle of justice, whereby one common carrier may, without compensation therefor, be compelled to provide space upon its premises for any common carrier to solicit patronage or business. If it must do this for one, it must do so for all who desire to carry on such business. If

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the public is inconvenienced or oppressed by any regulations the respondent may adopt, or if the service becomes inadequate or unreasonable and dilatory, the state may compel the respondent to provide reasonable and adequate means to meet the necessities of the public; but neither the public nor the state is here complaining nor resisting the application of the respondent. The appellants, therefore, may not champion the rights of the public, nor those of the state; and in no event may they do so for the sole purpose of advancing their own private interests, although such interests may in some way come in touch with the interests of the public. No doubt the respondent may not interfere with any one who solicits business outside of its own premises, so long as such solicitors do not unduly impede the ingress and egress to and from its premises. Such regulation, however, if any is to be made, belongs to the municipality or the state. Some of the courts have advanced the theory that the carrier need not provide space for all hackmen or transfer companies, but must provide only a reasonable amount of room. If this be sound, then it follows that, if the space cannot accommodate all, some must be excluded. If some may be excluded in this way, why may not all be except one? Moreover, one cab or transfer company may alone have more vehicles than can at one time be admitted to the grounds. If this condition exists, and the carrier need not provide space for all, why is it that the arrangement he may make with one only, who occupies all the space, is void? If it be said that the carrier must allow at least more than one the right to enter, but need not provide space for all, then, again, the carrier must necessarily select those that may enter from the whole number who desire to do so. In this selection the carrier must necessarily discriminate in favor of one or more and against others. Is it not more in consonance with reason and common sense to permit the carrier to regulate the whole matter, subject to the control of the state in case the carrier abuses his privilege as a quasi public servant? Can the law confer the right upon one person to carry on a part of his own business upon the property of another under the guise of regulating the business of transporting persons and property? This may, perhaps, be done, in case the state imposes this condition in granting the charter or privilege under which the business is conducted. The courts, however, have no right to impose such condition under the mere claim that it is sanctioned by the elastic term of public policy. The principles adverted to are well stated and illustrated in the cases of *Pennsylvania Company v. City of Chicago*, 181 Ill. 289, 54 N. E. 825, 53 L. R. A. 223, and *Donovan v. Pennsylvania Company*, 120 Fed. 215, 57 C. C. A. 362, 61 L. R. A. 140, which is affirmed in 199 U. S. 279, 26 Sup. Ct. 91, 50 L. Ed. 192. The last two cases cited go over the whole subject and treat it both

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from the standpoint of statutory regulation and the fundamental principles involved, and they clearly sustain the injunction granted in this case. We are convinced that the judgment of the district court is in harmony with the underlying principles involved and is sustained by sound reason.

The judgment is therefore affirmed, with costs to respondent.

MCCARTY, C. J., and LEWIS, District Judge, concur.

LAPRE v. WORONOCO ST. RY. CO.

(Supreme Judicial Court of Massachusetts, Hampden, Oct. 15, 1907.)

[82 N. E. Rep. 9.]

Master and Servant—Liability for Negligence of Fellow Servants.

—For the negligence of fellow servants of the watchman at a street car barn, in putting in coal into the cellar in such a manner that it was liable to fall, and a piece of which did fall, on him as he was going on his rounds, the master is not liable.

Same—Assumption of Risk.*—Where coal is put into a bin, near which the watchman in a street car barn passes on his rounds, at irregular times and in varying quantities, without notice to him, he assumes the risk of its being put in in such quantity and manner that a piece of it may fall on him as he passes it.

Same—Fellow Servants.†—Where coal was put into the cellar of a street car barn in such quantity and manner that a piece of it was

*See foot-notes appended to *Clippard v. St. Louis Transit Co.* (Mo.), 23 R. R. R. 107, 46 Am. & Eng. R. Cas., N. S., 107; *Kansas City, etc., Ry. Co. v. Loosley* (Kan.), 24 R. R. R. 712, 47 Am. & Eng. R. Cas., N. S., 712.

†For the authorities in this series on the question whether the superior employee of their common master was acting as a fellow servant or vice principal at the time an employee under his orders was injured through his negligence, see foot-notes appended to *Peterson v. Philadelphia, B. & W. R. Co.* (Pa.), 23 R. R. R. 150, 46 Am. & Eng. R. Cas., N. S., 150; foot-notes appended to *Russel v. Lehigh Valley R. Co.* (N. Y.), 23 R. R. R. 135, 46 Am. & Eng. R. Cas., N. S., 135 (foremen's negligence causing injuries to their hands); *Maloney v. Florence, etc., R. Co.* (Colo.), 23 R. R. R. 145, 46 Am. & Eng. R. Cas., N. S., 145 (roadmaster's negligence in failing properly to inspect mountain side, from which a large rock fell upon hands at work on track); *Wilson v. Southern Ry.* (S. Car.), 22 R. R. R. 548, 45 Am. & Eng. R. Cas., N. S., 548 (in running train, the conductor was a representative of the railroad); *Morrison v. San Pedro, etc., R. Co.* (Utah), 22 R. R. R. 690, 45 Am. & Eng. R. Cas., N. S., 690 (negligence of trainmaster in permitting his train to be run in violation of bulletin orders was negligence in his capacity as vice principal); *Shugart v. Atlanta, etc., Ry.* (C. C. A.), 17 R. R. R. 558, 40 Am. & Eng. R. Cas., N. S., 558 (fireman killed through negligence of his engineer in causing a derailment); *Grout v. Tacoma Eastern R. Co.* (Wash.), 10 R. R.

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liable to fall, and did fall, on the watchman while he was making his rounds, any negligence of the street railway company's superintendent, who, having been told that the coal ought to be pushed back or no more could be put in, had gone in the cellar before the accident, and on returning merely said to the watchman that he would find there was plenty of coal for a good while, was that of a fellow servant.

Exceptions from Superior Court, Hampden County; William Cushing Wait, Judge.

Action by Louis Lapre against the Woronoco Street Railway Company for personal injuries sustained by plaintiff while in defendant's employ. There was a directed verdict for defendant, and plaintiff brings exceptions. Exceptions overruled.

The first count of the declaration was as follows:

"Plaintiff says he was in the employ of the defendant; that it was the duty of the defendant to furnish him with a reasonably safe and suitable place in which to work, and to give him proper and suitable instructions with reference to the dangers attending his work; that the defendant, disregarding the aforesaid duties, negligently failed to furnish the plaintiff with a reasonably safe and suitable place in which to work, and negligently failed to sufficiently warn and instruct the plaintiff concerning the dangers attending his work, and negligently failed to furnish the plaintiff with reasonably safe and suitable instrumentalities with which to work; and that by reason of the negligent failures aforesaid, the plaintiff, while in the exercise of due care and while in the line of his employment, and in the performance of his duties, was severely injured, and as a result of said injuries, he, among other things, lost the sight of one eye, and that he has suffered great pain of body, and anguish of mind, and has

R. 253, 33 Am. & Eng. R. Cas., N. S., 253 (brakeman not fellow servant of conductor of construction train, so as to charge brakeman with results of latter's negligence in ordering coupling to be made in defective manner); extensive note, 14 R. R. R. 22, 37 Am. & Eng. R. Cas., N. S., 22 (conductor and members of his train crew); extensive note, 14 R. R. R. 302, 37 Am. & Eng. R. Cas., N. S., 302 (engineer and other members of same train crew); extensive note, 16 R. R. R. 152, 39 Am. & Eng. R. Cas., N. S., 152 (superior servant limitation of fellow-servant rule); foot-notes appended to *Morrison v. San Pedro, etc., R. Co.* (Utah), 22 R. R. R. 690, 45 Am. & Eng. R. Cas., N. S., 690; foot-notes appended to *Wilson v. Southern Ry.* (S. Car.), 22 R. R. R. 548, 45 Am. & Eng. R. Cas., N. S., 548 (who are vice principals or superior servants); foot-notes appended to *Neagle v. Syracuse, etc., R. Co.* (N. Y.), 22 R. R. R. 89, 45 Am. & Eng. R. Cas., N. S., 89; foot-notes appended to *Cincinnati, etc., Ry. Co. v. Hill's Adm'r* (Ky.), 22 R. R. R. 52, 45 Am. & Eng. R. Cas., N. S., 52; *Mississippi Cent. R. Co. v. Hardy* (Miss.), 21 R. R. R. 1, 44 Am. & Eng. R. Cas., N. S., 1.

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been put to great expense for medicines, medical attendance and nursing."

Plaintiff was night watchman at the street car barn of defendant, and while he was passing on his rounds, near the coal bin in the cellar, a large piece of coal fell on him.

Shortly before the accident, and after the coal had been put in, an employee of the company told the superintendent that the coal ought to be pushed back from the window, or no more could be put in, and the superintendent went into the cellar, and after being there several minutes he returned, and merely said to plaintiff that he had been in the cellar, and had seen the coal in the bin, and that plaintiff would find they would have plenty of coal for a good while.

Brooks & Hamilton, for plaintiff.

Green & Bennett, for defendant.

MORTON, J. The action is at common law, and only the first count is relied on.

The putting in of the coal was done by fellow servants of the plaintiff, and if the coal was put into and left in the bin in such a way that it was liable to fall upon and did fall upon the plaintiff and injure him, the negligence, if any, which caused the accident was the negligence of the plaintiff's fellow servants and the defendant is not liable therefor. Moreover we think that the risk was one of the obvious risks of the plaintiff's employment. Coal was not put into the bin at fixed times or in fixed quantities, but as it might happen, and no notice was given to the plaintiff. In other words he was left to find out for himself when and how much and in what manner the coal was put in and to govern himself accordingly. The fact that at this time more coal was put in than had been put in before was one of the incidents of the business, and if it was left carelessly piled in the bin, that, as already observed, was the act of fellow servants. It is not necessary to consider whether the plaintiff was himself in the exercise of due care in going down into the cellar without his lantern when the electric lamp was out and grouping his way to the side of the bin where the key to his time clock was kept. If there was any negligence on the part of Savery, the superintendent, it was that of a fellow servant, and the defendant is not liable therefor.

Exceptions overruled.

LOUISVILLE & N. R. CO. *v.* PENDLETON'S ADM'R.

(Court of Appeals of Kentucky, Oct. 11, 1907.)

[104 S. W. Rep. 382.]

Master and Servant—Nature of Relation.—The relation of master and servant is created by contract, and imposes reciprocal rights, duties, and obligations.

Same—Duty to Furnish Safe Appliances and Place for Work.*—It is the duty of the master to provide reasonably safe premises and appliances for the servant's use.

Negligence—Care Required as to Trespassers.†—A trespasser or volunteer, who is injured, cannot recover from the owner of the premises unless the injury is inflicted after his peril is discovered.

Master and Servant—Injuries to Servant—Deviation from Regular Employment.‡—Where a person employed by a railroad as car inspector voluntarily undertook, without authority, the work of assisting a switching crew, the relation of master and servant was temporarily suspended.

Same—Creation of Relation—Implied Contract.§—The mere knowledge and implied consent of an agent in charge of railroad yards,

*For the authorities in this series on the question of the care required of a railroad company in furnishing an employee a safe place to work, see foot-notes appended to *McGregor v. Pennsylvania R. Co. (Pa.)*, 22 R. R. R. 76, 45 Am. & Eng. R. Cas., N. S., 76; *Norfolk, etc., Co. v. Gesswine (C. C. A.)*, 20 R. R. R. 553, 43 Am. & Eng. R. Cas., N. S., 553; *McTaggart v. Maine Cent. R. Co. (Me.)*, 19 R. R. R. 240, 42 Am. & Eng. R. Cas., N. S., 240.

†For the authorities in this series on the subject of the duties and liabilities of a railroad company with respect to licensees and trespassers on its premises, see foot-notes appended to *Baltimore & O. S. W. R. Co. v. Slaughter (Ind.)*, 22 R. R. R. 333, 45 Am. & Eng. R. Cas., N. S., 333; foot-notes appended to *Hudson v. Atlantic Coast Line R. Co. (N. Car.)*, 22 R. R. R. 305, 45 Am. & Eng. R. Cas., N. S., 305; foot-notes appended to *Wilkie v. Richmond Traction Co. (Va.)*, 21 R. R. R. 659, 44 Am. & Eng. R. Cas., N. S., 659; *Croft v. Chicago, etc., Ry. Co. (Iowa)*, 21 R. R. R. 583, 44 Am. & Eng. R. Cas., N. S., 583.

‡For the authorities in this series on the subject of the care due from railroad companies to volunteers performing services for them, see foot-notes appended to *Atlanta & W. P. R. Co. v. West (Ga.)*, 14 R. R. R. 548, 37 Am. & Eng. R. Cas., N. S., 548, where all the preceding authorities in this series are collected.

§For the authorities in this series on the question as to who are, and are not, railroad employees, see foot-notes appended to *Atlanta & W. P. R. Co. v. West (Ga.)*, 14 R. R. R. 548, 37 Am. & Eng. R. Cas., N. S., 548, where all the preceding authorities are collected, foot-notes appended to *Arkadelphia Lumber Co. v. Smith (Ark.)*, 24 R. R. R. 514, 47 Am. & Eng. R. Cas., N. S., 514; *Hayman v. Philadelphia & R. Co. (Pa.)*, 24 R. R. R. 475, 47 Am. & Eng. R. Cas., N. S., 475; *Louisville, etc., Ry. Co. v. Illinois Cent. R. Co. (Ky.)*, 22 R. R. R. 653, 45 Am. & Eng. R. Cas., N. S., 653; foot-notes appended to

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who saw an employee of the company leave his regular employment as car inspector and assist a switching crew, did not create by implication of law the relation of master and servant between the employee and the company while he was engaged in that work.

Appeal from Circuit Court, Todd County.
 "To be officially reported."

Action by J. E. Pendleton's administrator against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed, and new trial ordered.

Benjamin D. Warfield and Perkins & Trimble, for appellant.
Petrie & Standard, for appellee.

CARROLL, J. J. E. Pendleton, while engaged in assisting a switching crew, was killed by being crushed between two cars. In this action his administrator recovered \$5,000 for the destruction of his life. A reversal is asked for several alleged errors committed by the trial court.

To understand fully the questions involved, it will be necessary to relate with some particularity the facts exhibited by the record. Pendleton, who was about 22 years of age, was first employed in November, 1904, by appellant as a yard clerk in its yard at Guthrie, Ky. He remained in this branch of the service until January, 1905, when he was transferred to the car inspector and repair department, and worked there until his death on February 6, 1905. His duties as yard clerk and in connection with the inspector and repair department did not require him to do anything with reference to the switching or shifting of cars in the yard, or to assist in any way the switching crew; and it is conceded that he was never employed as a member of the switch crew. Previous to his engagement by appellant, and during the time he acted as yard clerk and worked in the inspector and repair department, he was endeavoring to fit himself for the position of brakeman, and had quite a desire to get this place. Frequently, while acting as yard clerk and inspector, he assisted the switching crew in their work, throwing switches, giving signals to the engineer, riding the cars—in fact, doing everything that the regular switching crew did. There is evidence that he did this with the knowledge and at least implied consent of the person in charge of the yard and in charge of the switching crew. On behalf of appellant the evidence upon this question is in effect that, although its agent in charge knew Pendleton often assisted the switching crew in the performance

Atchison, etc., Ry. Co. v. Fronk (Kan.), 22 R. R. R. 95, 45 Am. & Eng. R. Cas., N. S. 95; *Shannon v. Union R. Co.* (R. I.), 22 R. R. R. 80, 45 Am. & Eng. R. Cas., N. S. 80; foot-notes appended to *Alabama Great So. R. Co. v. Burks* (Ala.), 21 R. R. R. 562, 44 Am. & Eng. R. Cas., N. S., 562.

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of the duties before mentioned, he had frequently requested him not to do so, calling his attention to the dangerous nature of the employment. The foreman under whom he worked as assistant inspector and car repairer testified that his duties in this department required his attention from 7 o'clock in the morning until 6 in the afternoon, although it often happened that for a short time during these hours there was no work necessary to be done in that department. Pendleton was killed at 5 o'clock in the afternoon, and immediately before this was engaged in his duties as car inspector with Anderson, his foreman. Anderson testifies that, when Pendleton left at 5 o'clock to assist the switching crew, he needed his services, and so informed him; but, notwithstanding this, he went to where the switching crew was at work, doubtless expecting to return to Anderson in a short while. Several days before February 6th a car loaded with coal had been placed on a coal track, adjacent to a coal yard, to be unloaded, and after being unloaded it was permitted to stand for about four days on the coal yard track, so close to the passing track used for switching purposes that a person riding on the ladder on the side of a car on the passing track would be struck by the car on the coal track, although there was room for the cars to pass. On the evening Pendleton was killed the switching crew was engaged in putting ten cars on the passing track. To do this the cars were run by the coal track on which the empty coal car was standing. The switch crew consisted of an engineer, fireman, conductor or foreman, and two switchmen. These composed the full crew. Five of the cars were first put on the passing track; Pendleton being with the crew. These five cars were left on the passing track by the engine, and it went back to get the other five. After connecting with the last-named five cars, Pendleton threw the switch to permit the engine to take the cars on the track where the first five had been placed; and after throwing the switch, which was close by and in plain view of the car standing on the coal track, he jumped on one of the cars being pushed by the engine, putting his feet in the stirrup on the bottom of the side of the car, and holding onto the ladder attached to the side of the car, placed there for the purpose of enabling employees to get from the ground to the top of the car. While thus riding on the side of the car he was struck and almost instantly killed by coming in contact with the empty coal car standing on the coal track as the car on which he was riding passed it. When Pendleton jumped on the car, as it was passing the switch he had opened, it was running about eight miles an hour. It does not appear that the engineer or any of the switch crew knew that he was going to get on the car; but the engineer saw him a moment after he had climbed on the side of it, and, knowing the proximity of the empty car to the passing track and the perilous position that Pendleton was placed in, applied

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his emergency brake and did everything possible to stop; but he was not able to stop the cars until after Pendleton had been struck. We may remark in passing that no blame is attached to the engineer or any of the switch crew. The negligence complained of is in permitting this empty car to remain standing for several days so close to the passing track as to endanger the life of a person who might be riding on the side of a car running on the passing track. There being evidence to show that it was usual and customary for the switch crew to ride in the manner in which Pendleton was riding, the contention of appellee is that Pendleton, considering all of the facts and circumstances proven in the case, is entitled to be treated as if he were a member of the switch crew.

The real issue in the case, and the one to which counsel have especially addressed themselves, may be thus stated: For appellee it is said that as Pendleton, with the knowledge and implied consent and approval of the person in charge of the yard, was permitted to frequently perform the duties of a switchman, such as throwing switches, giving signals, and riding cars, the company owed to him the same duty that it did to a regular member of the switching crew. The company's argument, supported by the testimony introduced by it, is that Pendleton was employed in a different department of its service; that he had no duties to perform in connection with the switching crew; that although he was at times, with the knowledge and apparent consent of the person in charge of the yard, permitted to assist in the performance of these duties, he did so without his approval and in opposition to his direct commands; and hence he is to be treated as a trespasser or volunteer, and the company cannot be held responsible for his death. It is further urged that his duties as car inspector and repairer demanded his attention and service from 7 a. m. to 6 p. m., and that during these hours he should have remained at the place where the performance of his duties required him to be. It may safely be said, and for the purpose of this case we will assume, that the evidence establishes that Pendleton did, with the knowledge and at least implied consent of appellant's agent in charge of the yard, although not by his request or direction, often assist in switching cars and perform all the other duties incident to the work of a switchman, and that when killed he was so engaged; that in throwing the switch, immediately before he jumped on that car that carried him to his death, the agent in charge of the yard was not present, nor was the foreman of the switching crew; nor did either of them have any knowledge that he was going to throw the switch or ride the car. And in considering the case we will treat it as if the agent of appellant in charge of the yard had the right to employ switchmen and to control their

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movements; in fact, that he was, in respect to everything done by employees of the company in and about the yard, the representative of the company, competent to charge it with his acts. We will also assume that if the relation of master and servant existed between the company and Pendleton—in other words, if he is to be deemed a brakeman—it was guilty of such negligence in permitting the car on the coal track to remain so dangerously near the passing track as to render it liable in damages for his death. So that the issue narrows down to the proposition, squarely put: Did the relation of master and servant exist between Pendleton and appellant at the time of his death, or was he then a mere trespasser or volunteer? Upon the correct determination of this question depends the result of this case, and we will endeavor to solve it by applying the law as we understand it to the facts as herein stated.

The relation of master and servant is created by contract, either express or implied. It imposes reciprocal rights, duties, and obligations. As a part of the duties growing out of this contractual relation the law imposes on the master the obligation of providing reasonably safe premises and reasonably safe appliances for the use of the servant; and if delinquent in these respects, and the servant is injured thereby, the master may be compelled to respond in damages for his breach of duty. This relation cannot be created by one of the parties. The assent of both, either express or implied, is necessary. A person cannot impose on another the responsible obligation resting upon a master without the participation of such other person. The law, in the absence of some contractual arrangement or agreement, express or implied, will not create the relation of master and servant. The trespasser or the volunteer, who is injured in or about the performance of labor that he undertakes, cannot look to the owner of the premises to compensate him for the injury or damage, unless it is inflicted after his peril is discovered. And when a person employed to perform certain services goes entirely without the line of his duty and assumes the performance of other labors for his master, without his direction or authority, he occupies no better position than if the relation of master and servant did not exist in respect to any employment between them, as, when the master engages a servant to perform specified service, he is only responsible to him for some breach of duty committed within the scope or limits of the employment for which the servant has been engaged. Thus, in Thompson on the Law of Negligence, § 4677, it is said: "An employee, who undertakes without the order or request of his employer, or the representative of the employer, or contrary to his orders, or in compliance with the orders or request of another employee who has no authority from the employer to give such orders or to make such request,

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to perform work outside the scope of his employment or upon dangerous premises, where the terms of his employment do not require him to do or be, * * * is deemed to assume the risk attendant upon his voluntary undertaking, and cannot recover for injuries occasioned by any defect in the premises, machinery, or tools to which he thus voluntarily exposes himself. The reason of the rule is obvious. The master undertakes to exercise reasonable care to the end of keeping his premises, his machinery, his tools, and his appliances in a reasonable condition of safety for the protection of the servant employed in a stated service, and so long as he continues in that service. But, when he places himself outside the line of his duty, the relation of master and servant is deemed to be temporarily suspended. His position is then in all things that of a trespasser or bare licensee. The master owes him no duty to anticipate his deviation from his duty and the possible danger which may arise to him therefrom, and to provide against it. He takes things as he finds them, and suffers all consequences of his own error, and cannot make his master liable therefor. The law will not, on obvious grounds of justice, compel the master to pay damages which the servant has brought on himself by undertaking to do something which the master did not employ him to do, but will ascribe his calamity to his own unnecessary and gratuitous act." The same doctrine is announced in *Labatt on Master and Servant*, § 633, and approved in *Louisville & Nashville R. R. Co. v. Hocker*, 111 Ky. 707, 64 S. W. 638, 65 S. W. 119. Therefore, although Pendleton at the time of his death was engaged by appellant as car inspector and repairer, and in this employment the relation of master and servant existed between them, with all its attending duties and obligations, yet it did not continue when without authority or direction he voluntarily undertook the performance of other duties entirely disconnected with those for which he was engaged. In performing these new duties, he occupied towards his employer or master the same relation as if he were an entire stranger. His attitude in assisting the switching crew was the same as if he had quit his work as clerk in a store or as laborer on a farm to undertake them.

The remaining question to be considered is: Did the fact that he assisted the switching crew, with the knowledge and implied consent of the agent in charge of the yard, have the effect of establishing for the time being the relation of master and servant between him and the person for whom he voluntarily assumed to work? In assisting the switching crew, he did not take the place of any member of that crew. His services were not needed. In helping them he was acting with a view to his own advancement, and endeavoring to become proficient as a brakeman and switchman; and in our opinion the relation of master

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and servant between Pendleton and appellant could not in this manner and under the facts of this case be created. Certain it is that he had never been employed as a member of the switching crew, nor had he ever been requested or directed by any person in authority to perform any of the duties in connection with it. The foreman of the crew had no authority to bind the company by his consent to or approval of Pendleton's service. He was under the control of the agent; indeed, strictly speaking, the right of employment was in the train dispatcher, under the rules of the company. He had his full complement of men. No emergency existed that made it necessary to obtain other assistance. Thompson on Negligence, §§ 4982-4990. The mere knowledge, and we may assume implied consent and approval, of the agent in charge of the business, who looked on and saw decedent quite frequently assist the switching crew, did not have the effect of creating by implication of law the relation of master and servant, or convert him from a volunteer into a servant. We do not mean to say that this relation may not be created by an implied contract, as if a person authorized to employ labor should request or accept the needed service of a person who volunteered to perform it. But it would be announcing an unreasonable rule to declare that any person, who might choose, for his own instruction, entertainment, or benefit, to assist persons engaged in an occupation, might thus become in the eye of the law a servant entitled to demand and receive the protection accorded to persons that occupied that relation by virtue of rights growing out of contract. It is true that, if Pendleton's services were not needed or desirable, he could have been peremptorily ordered to absent himself from the yards, or, if necessary, could have been discharged from the employment of the company, or, indeed, in an extremity, might have been arrested for trespassing. But persons in the conduct of their business are not required to resort to these extreme measures to prevent men of intelligence and common understanding from volunteering in affairs about which they are not employed; nor is it necessary that they should do so to prevent a volunteer, trespasser, or intruder from creating the legal relation of master and servant. Intruders, trespassers, and volunteers assume the risk incident to the unauthorized acts they perform; and, in dealing with them in cases of injury, the law will not enforce or apply the rules governing the relation of master and servant, but only hold the persons accountable for the injury to the duty of avoiding it, if they could have done so by the exercise of ordinary care after the peril was actually discovered. When Pendleton left his employment as car inspector, and went to assist the switching crew, he must be held to have accepted conditions in the switching yards exactly as he found them. As to him, the railroad company was under

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no obligation to move the car causing his death; nor can it be held liable for its negligence in permitting it to remain there. It owed him no duty, except to avoid injury after his peril was actually discovered.

It would be difficult, and we will not attempt, to lay down any fixed rule, or one of general application, in the settlement of the intricate question as to when persons not employed are to be treated as volunteers or as servants. The conditions and circumstances under which volunteers perform services are so varying that often, although beginning as volunteers, they may become for the time being servants, entitled to protection the same as if regularly employed in the first instance. The books are full of distinctions and differences, growing out of the facts of each case as they are presented to the court. We may, however, with no sense of uncertainty, say that something more than mere knowledge of, and implied consent to, occasional acts of service, in employments like the one under consideration, will be required to create the important relation of master and servant. If the relation could be thus established, employers, especially those engaged in large business interests, with widely separated agencies, operating under systems carefully planned and constructed to insure discipline, efficiency, and safety, and where each employee is selected with some reference to his fitness and qualifications for the service he is engaged to perform, would often find their business disarranged, their discipline interfered with, and their employees hindered and disturbed. Aside from this, they would be subjected to liabilities they had not contracted for, and could not well anticipate or guard against. In *Labatt on Master and Servant*, vol. 2, § 630, it is said: "A person cannot be subjected, without his own consent or that of his agent, to the obligations which the law attaches to the contract of hiring." It must also be conceded that there is a wide difference between requesting or directing a person to work even for an hour or a few minutes, and merely permitting him to render desultory service that is not needed, although it may be accepted, and thus impliedly, at least, consented to. In the one instance the master has been consulted. He has exercised authority and discretion. In short, he had entered into a contract. In the other, he has merely submitted to interference by a volunteer upon his premises and permitted him to do things that were not helpful or necessary. And this distinction will be found running all through the cases on this subject. A formal or express agreement is not required, nor is it essential that compensation should be paid or expected from the one sought to be charged. Also, the relation may be implied from facts and circumstances surrounding the employment; but we will not, in the course of this opinion, undertake to say what

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facts might raise an implied contract, as it is not necessary to the decision of this case that we should do so. Sufficient for the questions before us is the statement that here the facts do not warrant the conclusion that there was an implied contract.

In *Kentucky Central R. Co. v. Gastineau's Adm'r*, 83 Ky. 119, Gastineau, a boy between 14 and 15 years of age, was run over and killed by a car of the railroad company which he was endeavoring to uncouple from a train while switching in the company's yard. In a special verdict the jury found that the deceased, when killed, was voluntarily assisting the employees of the road, with their knowledge and consent, in switching cars; that they discovered his peril too late to prevent his death; and that he contributed to it by his presence and offering to uncouple the car. In the course of the opinion the court said: "The deceased could not be regarded as a servant or employee of the company at the time of his death. He did not in a legal sense occupy that relation, and was to it a stranger; and in this light the rights of the parties must be viewed. A railroad company has a right to the exclusive use and occupation of its yard and track, except at crossings or such places as the public are by law authorized to use. Otherwise, it could not properly perform its duties to the public. It is not required to anticipate the intrusion of others, and one who enters upon them without right does so at his peril, and in case of injury cannot recover, unless it was wantonly inflicted after the danger was discovered. * * * Without having in view for the present the age of the deceased, we remark that the fact that a mere employee knows of the presence of an intermeddler does not legalize it, and so place him as to the company in its protection that it is bound to anticipate and ascertain if he has placed himself in danger, instead of being merely bound to use reasonable care to avert it after its discovery. It has been held that even a request of one, being an employee of the company, to do some act connected with the management of a train, does not impose such a duty upon it or render the person less an intermeddler as to the company." This opinion was followed and approved in *Monehan v. Covington St. Ry. Co.*, 117 Ky. 771, 78 S. W. 1106; *Illinois Central R. Co. v. Broughton*, 78 S. W. 876, 25 Ky. Law Rep. 1752; *L. & N. R. Co. v. Hocker*, 111 Ky. 707, 64 S. W. 638, 65 S. W. 119; *Hatfield v. Adams*, 96 S. W. 583, 29 Ky. Law Rep. 880.

We have examined with care the authorities cited by appellee, but in none of them do we find anything in conflict with the principles heretofore announced. In *Illinois Central R. Co. v. Timmons* the principal question in the case was whether or not the person who employed Timmons had authority to do so; and this was the point in issue. In *Collins v. C., N. O. & T. P. Ry. Co.*, 18 S. W. 11, 13 Ky. Law Rep. 670, Collins was injured by

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the explosion of a gas tank. One of the issues in the case was whether or not at the time he received the injury he was engaged in the business of the company. After stating the facts, the court said: "These facts plainly show that in the case of a fire upon appellee's premises it was the duty of deceased to aid in extinguishing it, and that in doing so he was acting as its employee." In *Cumberland Telephone & Telegraph Co. v. Adams*, 91 S. W. 739, 28 Ky. Law Rep. 1265, Adams was in the employment of the company as a groundman. On the evening he was hurt he was sent by the foreman with his brother, Ed Adams, who was a lineman, to adjust some trouble which had occurred to the company's wires. When they arrived at the place, his brother ordered him to climb the pole and remedy the trouble. He did as directed, and in the performance of the duty was injured. The point was made that at the time he received the injury he was acting as a lineman, that being a different grade of employment from groundman, and hence he ought not to recover, as he was engaged in a service outside the line of his employment. The court said: "Now it is clear that whether appellee is called a lineman or groundman does not alter his right to recover in this action, if he was on the pole at the time of his injury in the performance of any duty he owed to appellant. If it be true, as he says, that Lee sent him to assist his brother, who, being a lineman, was his superior, and his brother told him to climb the pole, then he was in the performance of a duty owing to his employer. Of course, if he was a mere volunteer, who went up the pole without right or authority, then the company owed him no duty at all. We think it entirely immaterial whether appellee was technically a lineman or groundman. If he was a groundman, beginning to perform the duties of a lineman, and was in truth sent up the pole by his superior, then he was entitled certainly to no less protection, because of his want of experience, than if he had been a lineman, so experienced as to know better how to take care of himself. The whole question turns, not upon whether appellant was a lineman or groundman, but whether at the time he climbed the pole he was in the performance of a duty he owed to appellant company." In *Johnson v. Ashland Water Company*, 71 Wis. 553, 37 N. W. 823, 5 Am. St. Rep. 243, it is stated in the opinion that "the plaintiff was engaged in the defendant's work at the request of a man in charge of the work, and although it may be said that his employment was for a mere temporary purpose, and that the plaintiff was not expecting any pay for the work done, and in that sense the work was volunteered, still, being in the defendant's employment and at the request of its servant or foreman, he was not a trespasser, and he was for the time being the servant of the defendant, and entitled to the same protection as any other

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servant of the defendant." In *Dallemand v. Saalfeldt*, 175 Ill. 310, 51 N. E. 645, 48 L. R. A. 753, 67 Am. St. Rep. 214, the servant was performing duties outside the scope of his employment, but by direction of a foreman. In *Huntzicker v. Illinois Central R. Co.*, 129 Fed. 548, 64 C. C. A. 78, the injured person was learning the duties of brakeman by the written direction of the trainmaster. In *Ringu v. Oregon Coal Co.*, 44 Or. 407, 75 Pac. 703, young Ringu, who was injured, was assisting his father in working in a mine. It was the custom, authorized by the company, to permit fathers to employ their sons, and for some time before the accident Ringu had been so working with the knowledge and consent of the company, and the company had furnished extra cars for his use and paid the father for his services. It will thus be seen that all of these cases are easily distinguishable from the one before us. Running through all of them will be found the proposition that the employment was by request, express or implied, and upon this assumption recovery was allowed. We have been unable to find any authority to support the position, taken by appellee, that the mere fact that Pendleton, with the knowledge and consent of appellant, rendered service to the switching crew, had the effect of creating the relation of master and servant.

Our conclusion is that upon the facts presented by this record appellee was not entitled to recover. He was a mere volunteer, who placed himself in a position of danger. The railroad company owed him no duty, except to exercise ordinary care to avoid injury to him after his position of peril was discovered; and, as we have seen, there is no claim of negligence in this respect.

Wherefore the judgment is reversed, with directions for a new trial consistent with this opinion.

BECKMAN *v.* MEADVILLE & C. S. ST. RY. CO.

(Supreme Court of Pennsylvania, June 25, 1907.)

[67 Atl. Rep. 983.]

Carriers—Independent Contractor.—A street railway company may be employed as an independent contractor by another street railroad to clean and repair its cars.

Same—Injury to Passenger—Liabilities.*—The tracks of a street railway company at the place of an accident were the property of a traction company, but in joint use by it and defendant street railroad, under a traffic agreement, which provided that the cars of defendant were to be cleaned and repaired by the traction company. Two cars of defendant had been delivered to the traction company, which dismantled one of them, attached it by chains to the other, and started it towards the car barn for repairs. The coupling chains broke, and the dismantled car ran down a grade until it collided with a car of defendant, in which deceased was a passenger. The workmen who were to repair and clean the cars were employed and controlled by the traction company, and defendant paid on the basis of an account kept of their wages. Held, that such workmen were not coemployees of defendant.

Same—Use of Joint Tracks.†—That a traction company and defendant used jointly tracks which were the property of the traction company, the defendant paying the company $2\frac{1}{2}$ cents for every passenger carried over its line, did not create a joint obligation of both companies for the safe carriage of defendant's passengers.

Same.†—Where a traction company agreed with defendant company to clean and repair its cars, the traction company was an independent contractor, and it, and not the defendant, was liable to a passenger on one of defendant company's cars for the negligence of the servants of the traction company.

Appeal from Court of Common Pleas, Crawford County.

Action by Byrinnia Beckman against the Meadville & Cambridge Springs Street Railway Company. Judgment for plaintiff. Defendant appeals. Reversed, and judgment ordered for defendant.

Thomas, P. J., of the court below, charged in part as follows: "We say to you, as a matter of law, as between Mr. Beckman and his legal representatives and this defendant company, it could not relieve itself of its obligation to Mr. Beckman by giving

*See preceding case, and foot-notes.

†As to the liability of their employers for acts of independent contractors, see extensive note, 24 R. R. R. 317, 47 Am. & Eng. R. Cas., N. S., 317.

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a contract to some other company to repair its cars, or to operate its cars, and if the cars were being hauled on the contract of another company, and results in an injury to Mr. Beckman, that would not relieve the defendant. You see, the companies operated by agents. A corporation cannot run a car. They must have persons to do so. And when the Meadville & Cambridge Springs Street Railway Company hired the Meadville Traction Company to repair its cars, the Meadville Traction Company and the persons working for it, were the servants or agents of the Cambridge Springs Line, and the Meadville & Cambridge Springs Street Railway Company is responsible for the negligence, not only of themselves, but for the negligence of those with whom they have contracted to do work in and about their line and cars. Nor does it matter, for the purpose of this case, whether the employees who were operating this car were employees of the Meadville Traction Company, or of the Meadville & Cambridge Springs Street Railway Company. It may be there is some obligation and rights existing between these companies, but, if the agent of the company that undertook to take John F. Beckman over its line was guilty of negligence with resulted in the death of Mr. Beckman, the Cambridge Springs Company is responsible for that act of the Meadville Traction Company. It is responsible for the acts of its servants, and if the cars were being operated, as we say, it does not matter for the purposes of this case, as to whether the persons operating those cars were at that time working for the Meadville Traction Company, or for the Meadville & Cambridge Springs Street Railway Company, providing they were acting for the defendant company as their agent or servants, and providing, further, that they were guilty of negligence which resulted in the death of Mr. Beckman. You can readily see that a trolley company could not delegate its right to use its road to some other person, unless the Legislature permitted it to do so, and thereby relieve itself from obligation to a person that it had obligated itself to carry safely over its line. The only possible question that might arise as to this is as to whether or not these men were acting under the authority of neither company."

Verdict and judgment for plaintiff for \$3,450. Defendant appealed.

Argued before MITCHELL, C. J., and FELL, MESTREZAT, POTTER, and ELKIN, JJ.

J. P. Hunter and A. G. Church, for appellant.

James P. Colter, Thos. J. Prather, and Manley O. Brown, for appellee.

MITCHELL, C. J. The essential facts, so far as they concern the liability of the defendant, are not in dispute. The tracks at

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the point where the accident occurred were the property of the Meadville Traction Company, but were in joint use by that company and the defendant under a traffic agreement. For the purposes of this case, therefore, they are to be considered as the property of each in turn while in use by it. Under the agreement the cars of defendant were to be cleaned and repaired by the traction company. Two cars of defendant had been delivered under this arrangement to the traction company, which dismantled one of them, attached it by chains to the other, and started both towards the car barn for cleaning and repair. On the way the coupling chains broke, and the dismantled car ran on a downgrade at increasing speed until it collided with the car of the defendant on a siding. The plaintiff's husband was killed in the collision, and, being a passenger on defendant's car, the presumption of negligence arose, and the burden of proof was on defendant to rebut it. This was fully done. The indisputable proximate cause of the accident was the breaking of the chain by which the dismantled car was attached to the one in front which drew it, and its thus being released from control and started on its dangerous descent. The sufficiency of the means and method of attachment for purpose of traction was the only question of negligence in the case. But it was not the negligence of this defendant. The fact that the colliding car was the property of the defendant was immaterial. For the time being it was the property of the traction company, having been delivered to it for repair and not yet returned. Whether it was on its way to the car barn for further work or for storage or for delivery is not material. It had not been returned to the defendant, but was still in the hands and under the control of the traction company, which for this purpose was an independent contractor. Cleaning and repairing cars was no part of the defendant's franchise which could not be delegated. It was the ordinary case of an independent mechanic receiving an article for repair, and while in custody of it so using it as to injure another person. If the traction company had hauled the car out to the other end of its road for the repairs, and the accident had taken place there, where defendant's cars did not run, no question would have arisen as to defendant's liability. Yet the case is no different. Neither the ownership of the colliding car nor the place of the accident has any relevancy at all to the question of defendant's liability. The negligence, if any, from which the accident resulted, was, so far as the evidence showed, that of the workmen who attached the dismantled car to the one drawing it. They were the employees of the traction company. Some effort was made to show that the defendant paid for their services, but the evidence only went so far as to show that as between the two companies the traction company was to repair

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and clean the cars at cost, and that it therefore kept an account, *inter alia*, of the wages paid for such services, and the defendant paid on that basis. The workmen themselves were employed, controlled, and discharged by the traction company and were in no sense coemployees of the defendant. •

Another effort was made to hold defendant liable on the ground that by the agreement it paid the traction company 2½ cents for every passenger it carried over the latter's lines, and therefore when the decedent paid his fare there arose a joint obligation of both companies for his safe carriage. But there is no basis for such claim. The defendant under the agreement was a lessee of running rights over the traction company's tracks, and the division of fares was only a method of estimating the rental to be paid. The traction company remained in the sole ownership and control of the road, and the defendant no more entered into a joint liability by that arrangement than any other tenant by an agreement to pay rent to his landlord. The class of cases arising from accidents caused by defective road-bed, running regulations, etc., for which the joint users of the road are equally liable to their passengers, has no applicability to the facts of the present case.

Summing up the whole case, briefly, it shows the defendant using what must be treated as its own track, lawfully and without negligence, and having its passenger killed by the act of a third party, over whom it had no control, and for whose action it was in no wise responsible. The presumption of negligence arising from the death of a passenger by collision having been fully rebutted, and there being no evidence to show negligence in fact, the verdict should have been directed for the defendant.

Judgment reversed, and judgment directed to be entered for the defendant *non obstante veredicto*.

CHICAGO, I. & L. RY. CO. *v.* BARKER.

(Supreme Court of Indiana, Jan. 17, 1908.)

[83 N. E. Rep. 369.]

Appeal—Assignment of Errors.—Where the record on appeal shows that the only demurrers filed were to the “amended” complaint, which demurrers were overruled, and the assignment of errors is to the overruling of the demurrers to the “complaint,” a contention that no question is raised as to the sufficiency of the complaint because the record shows there was no demurrer filed to any such pleading is unavailing where the record also shows that the only complaint at any time on file in the case is the one contained in the record on appeal.

Master and Servant—Death of Servant—Railroads—Complaint—Duty.—Where a railroad engineer was killed solely because a switch was left open, a paragraph of a complaint against the railroad company charging that it was defendant’s duty to keep the switch safe, and that it was negligent in permitting it to remain open, was fatally defective for failure to allege the facts which created the duty violated, so that the court might determine therefrom as a matter of law whether the duty existed or not.

Same—Duties of Master and Servant.*—While it is the duty of a master to employ only competent servants, to use due care in providing them with safe machinery and appliances, to exercise reasonable diligence to keep them in good repair, and to inspect them at reasonably frequent intervals, which duties the master cannot delegate, it is the duty of the servant to operate the appliances in all their details and departments, so that when any duty connected with operating a part of an appliance is delegated to another, such other becomes a fellow servant of all those engaged by the master in carrying on the common enterprise.

Same—Act of Fellow Servant.*—Where a railroad engineer was

*For the authorities in this series on the question, what are the duties of a railroad company which it cannot delegate so as to escape liability for injuries to its employees under the fellow-servant doctrine, see foot-notes appended to *McLean v. Pere Marquette R. Co.* (Mich.), 13 R. R. R. 544, 36 Am. & Eng. R. Cas., N. S., 544, where all the preceding ones are collected; foot-notes appended to *Morrison v. San Pedro, etc., R. Co.* (Utah), 22 R. R. R. 690, 45 Am. & Eng. R. Cas., N. S., 690; foot-notes appended to *Neagle v. Syracuse, etc., R. Co.* (N. Y.), 22 R. R. R. 89, 45 Am. & Eng. R. Cas., N. S., 89; foot-notes appended to *Cincinnati, etc., Ry. Co. v. Hill’s Adm’r* (Ky.), 22 R. R. R. 52, 45 Am. & Eng. R. Cas., N. S., 52; *Mississippi Cent. R. Co. v. Hardy* (Miss.), 21 R. R. R. 1, 44 Am. & Eng. R. Cas., N. S., 1.

For the illustrations in this series showing who are vice principals or superior servants, see foot-notes appended to *Struble v. Burlington, etc., Ry. Co.* (Iowa), 16 R. R. R. 259, 39 Am. & Eng. R. Cas., N. S., 259, where all the preceding ones are collected; foot-notes ap-

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killed by running into an open switch, and there was no claim that the switch was in any way defective, an allegation that defendant was negligent in permitting the switch to remain open was insufficient to show that the railroad company was negligent in the performance of a duty, as the opening and closing of the switch was a detail of the operation which the company was entitled to delegate to other servants; the test of liability being not the condition of the place nor the machinery at the instant of the injury but the character of the duty, the negligent performance of which caused the injury.

Same—Switch Lights.—Where decedent, a railroad engineer, was killed by running into an open switch, an allegation that the day was extremely cold, dark, and hazy, that the air was filled with flying frost, rendering it impossible for decedent to see more than a short distance, and that defendant failed to maintain a signal light on the switch stand as it was its duty to do, etc., did not exclude the inference that the accident happened in full daylight, nor did the allegation that the day was cold, and that the air was filled with flying frost, suffice to charge that the day was "dark and foggy," or that any other reason existed for maintaining a light on the switch in the daytime, under Burns' Ann. St., 1901, § 5173a, which only requires a light in the daytime when the day is dark and foggy.

Pleading—Recitals—Demurrer—Admissions.—In an action for death of a railroad engineer by running into an open switch, statements in the complaint that defendant knew that the day was dark and hazy and the atmosphere filled with flying frost, and that it was impossible for decedent to see along the track more than a short distance, were not allegations of fact, but mere recitals, which were not admitted by demurrer, which admits only facts well pleaded.

Master and Servant—Death of Servant—Proximate Cause—Complaint.—In an action for death of a railroad engineer by running into an open switch, a charge of negligence in that it was defendant's duty to furnish the engine cab with double or frost windows, and that by reason of defendant's negligence in furnishing a cab containing only single windows they became covered with frost and ice, thereby preventing decedent from seeing the open switch, was fatally defective for failure to show that the windows were used by the engineer in looking for the switch, or that he could have seen the switch through the windows if there had been no frost on them, and to show that the frost on the windows was either the proximate or remote cause of the accident.

Same—Assumed Risk.†—In the absence of an averment that decedent was ignorant of the fact that frost would accumulate on the

pendent to *Morrison v. San Pedro, etc., R. Co. (Utah)*, 22 R. R. R. 690, 45 Am. & Eng. R. Cas., N. S., 690; foot-notes appended to *Wilson v. Southern Ry. (S. Car.)*, 22 R. R. R. 548, 45 Am. & Eng. R. Cas., N. S., 548.

†For the authorities in this series on the subject of the general principles involved in the doctrine of assumption of risks by em-

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single window glass of his cab during a run on a cold day, the allegation was also defective for failure to show that he did not assume the risk in operating an engine with a cab equipped only with single windows.

Pleading—Contradictory Facts.—A party may set up contradictory facts in different paragraphs of either complaint or answer, but it is improper to allege conflicting facts in the same paragraph.

Master and Servant—Death of Engineer—Complaint.—In an action for death of an engineer by running into an open switch, a paragraph of a complaint alleging negligence in permitting the disks of the switch stand, which were different in color and in shape, the difference indicating the position of the switch, to become covered with snow and frost so that decedent could not tell whether the red signal or the white was toward him, was fatally defective for failure to show that the color of the signal panels was the only means by which the engineer could tell the condition of the switch, and to repel the inference that the position of the switch could have been determined by the size and shape of the panels, as well as by the color, notwithstanding the presence of the snow and ice.

Same—Fellow Servants—Engineer and Trackmen.†—A railroad section foreman is a fellow servant of the engineer operating trains over the road, under the rule that all who enter the same employment are prima facie fellow servants, the burden being on him who denies the relation to prove the contrary.

Same—Vice Principal.*—A complaint for death of a railroad engineer by running into an open switch, alleging that a section foreman was charged with the duty of keeping the track in repair, did not show that such foreman was the vice principal while engaged in operating the switch.

Same.*—It is the act itself that characterizes the performer as a vice principal or a fellow servant, and not the title of the actor, or the fact that he does superior duties.

Same—Signals.—Where a railroad engineer was killed by running into an open switch, an allegation that the section foreman was negligent in turning the switch stand on which the signal rested so as to open the switch and in permitting frost and snow to accumulate on the red signal so that decedent could not see it as he approached with his train was insufficient, where it appeared that the signal worked automatically and moved properly with the movement of the switch, it being also alleged that decedent could not see the signal on account of weather conditions, regardless of its situation.

Same—Statutes—Switch Targets.—Switch targets are not "signals,"

ployees, see foot-notes appended to *Southern Ry. Co. v. McGowan* (Ala.), 25 R. R. R. 353, 48 Am. & Eng. R. Cas., N. S., 353; foot-notes appended to *Denver, etc., R. Co. v. Warring* (Colo.), 24 R. R. R. 531, 47 Am. & Eng. R. Cas., N. S., 531.

†See foot-notes appended to *Mollhoff v. Chicago, etc., R. Co.* (Okla.), 19 R. R. R. 709, 42 Am. & Eng. R. Cas., N. S., 709.

See (*) on page 228.

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within Burns' Ann. St. 1901, § 7083, cl. 4, making a railroad company liable for injury caused by the negligence of an "employee" having charge of any signal, etc.; the statute being applicable only to such signals as are complete within themselves, and not subsidiary parts of another device, and so operated that by the negligence of the operator they may be made to speak falsely.

Same.—In an action for death of a railroad engineer by running into an open switch near a station, an allegation that the railroad company was negligent in permitting the station agent's view of the switch to be obstructed by a crossing warning board, so that the agent was prevented from seeing that the switch was open and from warning decedent's train by a semaphore at the station, was fatally defective for failure to state the facts showing how it became the station agent's duty to note the condition of the switch, whether by rule, contract, or custom, also for failure to allege the distance between the station house and the switch, or to show that the agent could have seen the target but for the warning board, and for failure to allege, except by inference, that there was a semaphore signal available to the agent, or that he could otherwise have signaled decedent that the switch was open.

Appeal from Circuit Court, Owen County; G. W. Grubbs, Judge.

Action by Dolly M. Barker, as administratrix of deceased, against the Chicago, Indianapolis & Louisville Railway Company. From a judgment for plaintiff, defendant appeals. Reversed with instructions.

Transferred from Appellate Court, 81 N. E. 1179.

E. C. Field and *H. R. Kurrie*, for appellant.

Chas. E. Thompson and *Homer Elliott*, for appellee.

HADLEY, J. Appellant owns and operates a railroad from Chicago to Louisville, through Indiana, and by way of Quincy, Owen county. At Quincy there is a station house on the west side and a switch on the east side of the main track. Four hundred and fifty feet north of the station is the north connection of the switch with the main track. The switch is operated by a switch stand, located on the west side, and about 6 feet from the west rail of the main track. The switch stand is 8 feet high, and has on top two wings, one painted red and the other white, and which serve as targets to signify to approaching trainmen whether the switch is open or closed; the red, when standing at right angles with the main track, indicating danger, or an open switch, and the white, when standing at right angles with the main track, indicating safety, or a closed switch. In the opening or closing of the switch the wings of the stand work automatically, and when in repair cannot mislead. Between the

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switch stand and the station house a country highway crosses the railroad, and on the west side of the main track is a warning board to caution travelers on the highway. In the north end of the station house is an observation window from which an unobstructed view up the track northward may be had for a long distance. The company also maintains at the station house a semaphore signal in the care and management of the telegraph operator, who was also the station agent, and which was 20 feet high, and had on top two blades 5 feet long and 6 inches wide, painted white and in colors, and by which device the telegraph operator signaled to approaching trainmen any orders he had to deliver, and whether or not the train should be stopped at the station. In approaching Quincy from the north the track is on a heavy downgrade. On December 30, 1902, the decedent Barker was in the employ of the appellant as a locomotive engineer, and as such had charge of a south-bound, through freight, the running time of which was scheduled at 30 miles an hour, and which, as the same approached Quincy, was running at that rate. There were other loaded cars standing on the switch. The switch had been left open, and Barker's train took the siding, collided with the standing train, and he was killed in the wreck which followed. Dolly M. Barker, his widow, qualified as administratrix, and brought this suit for the benefit of herself and children. The foregoing facts are set forth in all the four paragraphs of complaint, to each of which paragraphs a demurrer for insufficiency of facts was overruled and put at issue by the general denial. The cause was submitted to a jury, which returned a verdict for appellee. With the general verdict were also returned answers to a large number of interrogatories.

The record shows that the only demurrers filed by appellant were addressed to the several paragraphs of the "amended" complaint. These demurrers were overruled, to which rulings exceptions were reserved. In its assignment of errors in this court it is complained that the court below erred in overruling the several demurrers to the "complaint." Upon this showing it is contended by appellee that no question is raised here on the sufficiency of the several paragraphs of the complaint, because the record shows that there was no demurrer filed, and no exceptions reserved to any such pleading. We think otherwise. It further appeared from the record that when the demurrers were presented the only complaint then, theretofore, or thereafter, on file, was the complaint that now appears in the record. There was, and is, therefore, no possible chance for a mistake in the identity of the complaint demurred to. In this respect the record before us is radically different from the records in the cases cited by appellee. All the paragraphs of the complaint relate to the same injury.

Was the first paragraph sufficient? It is first alleged in this

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paragraph "that it was the duty of the defendant to keep the switch and appliances and mechanical devices attached, as a part of the defendant's railroad, in good repair, and safe for use by its employees, and that on the day aforesaid the defendant negligently suffered said switch to become, and remain, out of repair, and in an unsafe and dangerous condition in this, to wit: Said defendant, on said December 30, 1902, carelessly and negligently permitted said switch to become unlocked, and so turned open and adjusted, as to cause the train on which said Barker was then and there performing his duties as engineer, and which was running at a high rate of speed, to pass from the main track onto the switch and collide with certain heavily loaded cars standing thereon, whereby said train was wrecked and said Barker killed." All the default and negligence that resulted in the switch being left open is charged directly against the defendant. It is a well established rule of pleading that a complaint for negligence against a railroad company must show by proper averments the violation of a duty owing to the plaintiff by the company, or by some one else for whose particular acts the company is held, by statute, to be responsible. It is not sufficient to allege in general terms that it was the duty of the defendant to do this, or to do that. Such an averment is the statement of a conclusion, not of a fact. *Railroad Co. v. Peck*, 165 Ind. 537, 540, 76 N. E. 163, and cases cited. The general rule in such cases is that the pleader must distinctly set forth in his complaint the facts which he claims creates the duty that has been violated, and from the facts so stated the court will determine as a matter of law the existence or the nonexistence of the duty. *Pittsburg, etc., Co. v. Lightheiser*, 163 Ind. 247, 71 N. E. 218, 660; *Indianapolis, etc., Co. v. Foreman*, 162 Ind. 100, 69 N. E. 669; *Cleveland, etc., Co. v. Parker*, 154 Ind. 153, 56 N. E. 86; *Evansville, etc., Co. v. Duel*, 134 Ind. 160, 33 N. E. 355; *Chicago, etc., Co. v. Frye*, 131 Ind. 325, 28 N. E. 989; *Indiana, etc., Co. v. Dailey*, 110 Ind. 75, 10 N. E. 631; *Lake Shore, etc., Co. v. Stupak*, 108 Ind. 1, 8 N. E. 630; *Pittsburgh, etc., Co. v. Adams*, 105 Ind. 163, 5 N. E. 187; *South Bend, etc., Co. v. Cissne*, 35 Ind. App. 375, 74 N. E. 282; *Creamery Packing Co. v. Hotsenpiller*, 24 Ind. App. 122, 56 N. E. 250. The duties of master and servant are correlative. On the one hand, it is the duty of the master to employ none but competent servants, to use due care in providing his servants with a safe machine and appliances to work with, and to exercise reasonable diligence to keep them in good repair; and to the end that they be kept in good repair he is required to make inspection at reasonably frequent intervals. These duties are duties the master owes his servants, the performance of which he cannot delegate to another so as to relieve himself from responsibility for their nonperfect or imperfect performance. 20 A. & E. Ency. (2d Ed.) p. 55, and

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cases cited. On the other hand, the duty of operating the machine in all its details and departments is a duty the servant owes the master, and when any duty connected with operating any part of the machine is delegated to another by the master, such person performing such duty is a fellow servant of all others engaged by the master in carrying on the common enterprise. *Indianapolis, etc., Co. v. Foreman*, 162 Ind. 85, 69 N. E. 669, 102 Am. St. Rep. 185; *Hodges v. Standard Wheel Co.*, 152 Ind. 680, 52 N. E. 391, 54 N. E. 383; *Baltimore, etc., Co. v. Little*, 149 Ind. 167, 48 N. E. 862; *Indianapolis, etc., Co. v. Andis*, 33 Ind. App. 625, 72 N. E. 145; *St. Louis, etc., Co. v. Needham*, 63 Fed. 107, 11 C. C. A. 56, 25 L. R. A. 833; *Cleveland, etc., Co. v. Brown*, 73 Fed. 970, 20 C. C. A. 147; *Labatt on Master and Servant*, p. 1726. In the last case it is said: "The roadbed, tracks, ties, stations, rolling stock, and all the appurtenances of a well equipped railroad together constitute a great machine for transportation. It is the duty of the railroad company to use ordinary care to furnish a sound and reasonably safe machine, to use diligence to keep it in proper repair, and to use ordinary care to employ reasonably competent servants to operate it; but when this duty is performed the duty rests upon the servant to operate it carefully."

In the complaint under consideration it is not averred that the switch or any of its appliances was unsound, defective, or out of repair. The negligence complained of was not in construction, preparation, or repair of the railroad, but in its operation. The switch, as a part of the railroad, was safe before it was made unsafe by some one, who in doing it was not imperfectly performing a duty of the master. The allegation is that the defendant negligently permitted such switch to become unlocked and turned open and so adjusted as to carry the decedent's train from the main track onto the siding. According to the averments the situation resulted from no fault of the switch, or any appurtenances by which it was operated. It was made to unlock and turn open and shift the continuity of the rails from the main track to the siding. So far as the averments show, the master, or defendant, had not failed in any particular to furnish the plaintiff's decedent with a safe place and safe instrumentalities to work with, nor in any way failed to employ competent servants, nor to keep such place and instrumentalities inspected, and in good condition for the performance of all duties required of its employees. As relates to the defendant company, the averments show affirmatively that it had done all pertaining to the switch the law requires of it. As was said in *Davis v. Southern Pacific*, 98 Cal. 19, 26, 32 Pac. 646: "It is the duty of the master to provide a suitable switch and a competent servant for its operation, and when that is done his duty is at an end, and his liability ceases. The keeping of it in position, and its use and

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operation, is a duty belonging to the servant." The averment that the "defendant" negligently permitted the switch to become and remain open adds no strength to the pleading. Opening and closing and manipulating a switch in conducting the business of railroading is not a duty belonging to the master, and will not be held the master's act, even though performed by an officer of the highest rank. "There are certain duties which pertain to the position of master," says Mitchell, C. J., in *Railroad Company v. Johnson*, 102 Ind. 356, 26 N. E. 201, "and whoever performs them is, for the time being, standing in the master's place. There is also certain work which belongs to the servant, and whoever does this is, while so engaged, a fellow servant with any other employee who is in the same general employment." The full test of liability is not the condition of the place, nor the machinery, at the instant of the injury, but the character of the duty, the negligent performance of which caused the injury. Was it a duty of construction, preparation, or repair, or was it a duty of operation? *Southern Ind. R. R. Co. v. Martin*, 160 Ind. 280, 286, 66 N. E. 886; *Southern Ind. R. R. Co. v. Harrell*, 161 Ind. 689, 68 N. E. 262, 63 L. R. A. 460; *Pittsburg, etc., Co. v. Lighthouse*, 163 Ind. 247, 253, 71 N. E. 218, 660; *Miller v. Southern Pacific*, 20 Or. 285, 26 Pac. 70. Under the foregoing rules the first ground of negligence is insufficient.

As a second ground it is averred that at the time of the accident the day was extremely cold, and the air filled with flying frost; that by reason of the frost in the atmosphere and the hazy condition of the weather it was impossible for said Barker to see and observe the defective and open condition of said switch until within a few feet of the same; that he was wholly ignorant of its condition until said engine left the track; that said switch stand, by means of painted wings upon the top, was used to inform approaching trainmen whether said switch was open or closed; that on said day the defendant well knew the condition of the weather, and knew said day was dark and hazy, and that the air was filled with flying missiles of frost, and that it was impossible for Barker, as such engineer, to see but a short distance along the track ahead of his engine; that under the circumstances it was the duty of the defendant to maintain a signal light upon said switch stand to enable said decedent to determine, as he approached the same, whether said switch was open or closed; that if such light had been maintained the decedent would have observed the condition of the switch in time to put his train under control, and to have avoided the accident; that the defendant, disregarding its duties, then and there carelessly and negligently failed to place or maintain a switch light of any kind upon said switch stand. The allegations in reference to the switch light do not exclude the inference that the accident happened in the full light of day; and the averment

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that the day was extremely cold and the air filled with flying frost, and "by reason of the hazy condition of the weather it was impossible for Barker to see the open switch," is not a sufficient charge that the day was "dark and foggy," or that any other reason existed for maintaining a light on the switch in daytime. The statute only requires the display of a light in the daytime when the day is "dark and foggy." Section 5173a Burns' Ann. St. 1901. The mere allegation in the complaint that it was the duty of the defendant, under the circumstances, to maintain a light on the switch, cannot be considered. The facts set forth must show the duty, if it exists. The statements that the defendant knew the day was dark and hazy and the atmosphere filled with flying missiles, and that it was impossible for Barker to see along the track more than a short distance, are mere recitals, and not allegations of fact. A demurrer admits only such facts as are well pleaded. Facts merely recited are not well pleaded, and will not be considered in considering the sufficiency of a pleading on demurrer. *Malott v. Sample*, 164 Ind. 645, 74 N. E. 245; *Indianapolis, etc., Co. v. Foreman*, 162 Ind. 85, 69 N. E. 669, 102 Am. St. Rep. 185; *Jackson v. Farlow*, 75 Ind. 118; *Cleveland, etc., Co. v. Lindsay*, 33 Ind. App. 404, 70 N. E. 283, 998. In *McElwaine-Richards Co. v. Wall*, 159 Ind. 557, 65 N. E. 753, the complaint averred that the "defendant's" superintendent negligently ordered him to climb upon a plate or chord constituting a part of the building; that the plaintiff did not know how it was placed and held in position, and did not know how it should be held or fastened in position; that he did not know of the unsafe condition of said chord or plate, or that the same was not properly fastened in position; that the defendant and its superintendent knew at the time that said plate or chord was not tied or fastened, and was unsafe to go upon. It was held that these statements were mere recitals, and could not be considered in determining the sufficiency of the complaint. Likewise, in *Lake Erie, etc., R. Co. v. Mikesell*, 23 Ind. App. 395, 55 N. E. 488, the averments in the complaint were: "The defendant was unlawfully engaged in running its engine and cars over the streets of Frankfort and within the city at a faster rate of speed than four miles an hour, contrary to and in violation of an ordinance of the city of Frankfort." It was held that this recital was not a sufficient allegation of the fact that there was an ordinance of the city to that effect in force at that time. To the same effect see *La Porte Carriage Co. v. Sullender*, 165 Ind. 290, 75 N. E. 277; *Malott v. Sample*, 164 Ind. 645, 74 N. E. 245; *Indianapolis, etc., Co. v. Foreman*, 162 Ind. 85, 69 N. E. 669, 102 Am. St. Rep. 185; *Erwin v. Telephone Company*, 148 Ind. 371, 46 N. E. 667, 47 N. E. 663.

The third charge of negligence in the first paragraph of complaint is in substance as follows: It was the duty of the de-

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fendant to furnish the cab of the engine the decedent was running with double or frost windows, to prevent the accumulation of frost or ice on the windows of the cab. That by reason of the carelessness and negligence of the defendant each of the windows of the cab at the time of the accident to the decedent consisted of a single pane of glass, and by reason of the heat on the inside of the cab and the extreme cold on the outside and the pressure of steam from the engine on the outside caused said glass to become covered with frost and ice, thereby obstructing the view and preventing the decedent from seeing the open and dangerous condition of the switch.

These allegations are not only subject to the same infirmities as the preceding, but they also fail to show that the absence of frost windows from the engine cab was either the proximate or remote cause of the accident; it not appearing that the windows of the cab were used by the engineer to look for the switch, or that he could have seen the switch through the windows, had there been no ice or frost upon them. Neither is it averred that the decedent was ignorant of the fact that frost would accumulate on single window glass during a run on a cold day; nor facts alleged showing that he did not assume the risk of its doing so. To constitute actionable negligence all these things should have been affirmatively shown. *American Rolling Mill Co. v. Hullinger*, 161 Ind. 673, 67 N. E. 986, 69 N. E. 460, and cases cited; *Day v. Cleveland, etc., Co.*, 137 Ind. 206, 36 N. E. 854; *Bedford, etc., Co. v. Brown*, 142 Ind. 659, 42 N. E. 359; *Louisville, etc., Co. v. Kemper*, 147 Ind. 561, 47 N. E. 214.

The second paragraph of the complaint also averred, in addition to the allegations common to them all, that appellant had one Emory McCullough in its employ as a section foreman; that he, as such section foreman, had supervision of that part of appellant's track that included said switch at the station of Quincy; that it was his duty as such section foreman to maintain the part of appellant's track under his supervision in good repair and safe condition for use of defendant's trains and defendant's employees operating the same; that it was the duty of the defendant to keep said switch closed so as to avoid accident to the company's servants engaged in running its trains; that in connection with said switch, and used in opening and closing the same, and for the purpose of informing the servants of said company, engaged in running its trains, as to the condition of said switch, whether open or closed, a certain switch stand, with two painted metal signals, disks, or panels attached to the top thereof, one painted white and the other red, was maintained by the appellant, and that these signals, under ordinary weather conditions, inform the company's servants operating its trains on approaching said switch whether the same was open or closed; that said switch signals were on

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said day under the control of said McCullough, and that it was his duty to adjust the signals and to keep the switch closed, and to keep them in proper repair; that said McCullough, in violation of his duty, negligently opened said switch and permitted it to remain open until the train drawn by the appellee's intestate ran into the same and killed him; that said McCullough was guilty of negligence in permitting snow and frost to remain on the red painted signal, on account of which the engineer was prevented from observing the condition of the switch as to being open upon approaching the same with his engine. There are also the same averments in this paragraph of the complaint that are contained in the first paragraph regarding the failure of the appellant to maintain signal lights on the switch post and double glass windows in the engine cab. There is no averment in either paragraph to indicate that the accident did not happen in broad daylight; no direct averment that the day was dark and foggy. There is this direct averment: "The 30th day of December, 1902, at the time of the accident, was extremely cold, and the air filled with flying missiles of frost," and because of the hazy, cloudy, and foggy condition of the weather it was impossible for said Barker to see the open condition of said switch, and this further recital: "On the day aforesaid the said defendant company well knew the condition of the weather, and that the day was dark and hazy." There was no direct averment in either paragraph of the complaint that the weather was either dark, hazy, or foggy; nor is there any averment that if the condition of the windows of the cab of the engine had been different the accident would have been prevented. Nor are there any allegations showing that Barker did not know the windows were of single glass, and that they were liable to become frosted over in a fast run nor to show that he did not assume the risk. *Rolling Mill Co. v. Hullinger*, 161 Ind. 673, 67 N. E. 986, 69 N. E. 460. Nor is there any averment that, had there been no frost or snow on the switch target, or signal, the engineer would have seen the target; and, in fact, in this same paragraph there are contradictory averments, namely, that on account of the weather conditions "it was impossible for said Albert S. Barker to see and observe the defective condition of the switch until within a few feet of the same," and on a previous page it is averred that Barker failed to see the open condition of the switch because McCullough permitted snow to get upon and obscure the red signal on the switch stand. Parties may set up a contradictory state of facts in different paragraphs of either complaint or answer, but it is not proper for them to set up a conflicting state of facts in the same paragraph. Nor does the complaint in this respect show that the color of the signal panels was the only means by which the engineer could tell the condition of the switch. The pleading does not repel the interference of the fact

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as it actually existed, that is, that these signal panels could be as readily distinguished by their form as by their color, the one being in oval shape with a hole 4 inches in diameter in the center of each disk, and the other being in square form with sharp pointed ends; and the complaint wholly fails to show that the result would have been different to the engineer had there been no snow or ice at all formed on the signal disks.

It is evident, however, that the principal theory of the pleader was to charge, in the second paragraph, McCullough, the section foreman, with being a vice principal, and acting for the master when he opened and negligently left the switch open. It is averred that, as section foreman, he had charge and supervision over that part of appellant's road that included the switch at Quincy, and that it was his duty to keep the same in good repair, and safe for appellant's trains and trainmen; that he neglected his duty, and opened the switch and failed to close it, and in consequence the accident occurred. It has more than once been held in this state that section or repair men are fellow servants of those operating trains. *Slattery's Adm'r v. Toledo, etc., Co.*, 23 Ind. 81; *Gormley v. Ohio, etc., Co.*, 72 Ind. 31; *Thompson v. Cit. St. R. R. Co.*, 152 Ind. 461, 53 N. E. 462; *Ohio, etc., Co. v. Tindall*, 13 Ind. 366, 74 Am. Dec. 259. It has also been held that *prima facie* all who enter the same employment are fellow servants, and the burden is on him who denies this to show the contrary. *Southern Indiana R. Co. v. Martin*, 160 Ind. 280, 286, 66 N. E. 886. The averment that McCullough was charged with the duty of keeping the track in repair does not fix his character as a vice principal while engaged in handling the switch. Handling a switch is not a master's duty, and it cannot be made such by averring that it is. It is the act itself, and not the title of the actor, or the fact that he does superior duties, that characterizes a performer a vice principal or fellow servant. *Southern Indiana R. Co. v. Harrell*, 161 Ind. 689, 68 N. E. 262, 63 L. R. A. 460; *Thacker v. Chicago, etc., Co.*, 159 Ind. 82, 64 N. E. 605, 59 L. R. A. 792; *Indianapolis, etc., Co. v. Johnson*, 102 Ind. 352, 26 N. E. 200. When the section foreman, McCullough, arrived in Quincy, he found a safe machine, with a switch and all its appliances in good working condition. He found that the railroad company had done all that it was required to do for the safety of its employees. As one employed to assist in operating the railroad, McCullough owed the company a duty to do his part carefully as pertained to the public, and to the company's property and employees. The railroad was safe before he made it unsafe by going away and leaving the switch open. The negligence was his, and not that of the company. Any other holding would completely overthrow the co-servant rule. Neither do we think the paragraph good under the employer's liability act. As we understand the pleading, an

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effort is made to charge liability under clause No. 4 of section 7083, Burns' Ann. St. 1901, which relates to the negligence of an employee "having charge of any signal, * * * switch yard," etc., by alleging that the painted targets on the switch stand is a "signal," and a single switch to a siding is a "switch yard," and that the section foreman may be properly in charge within the meaning of the statute. As such person in charge, McCullough is alleged to have been negligent in two particulars: First, in turning the switch stand upon which the signal rested so as to open the switch; and, second, in permitting frost and snow to accumulate on the red signal so that the decedent could not see it as he approached with his train. Neither of these grounds is tenable. In the first place it is affirmatively shown that no error was made in operating the signal of the switch. The alleged signal worked automatically, and showed the red, or danger side, just as it should appear when the switch is open. It was the moving of the switch that moved the signal, and not the moving of the signal that moved the switch. Besides it is not averred that Barker, the engineer, could have seen the signal, if there had been no snow upon it in time to have avoided the accident, and in another part of the same paragraph it is charged that he could not have seen the signal on account of the weather conditions. The effect of the averments concerning the signal is to show that the negligence charged in relation thereto was not the cause of the injury. Furthermore, switch targets are not signals within the meaning of the statute referred to. As before observed, they work automatically. They are fixtures to the switch stand, and cannot be manipulated independently of the switch. They are a device so adjusted to the switch stand that the switch cannot be opened or closed without shifting the targets, the white to a right angle position to the main track, when the switch is closed, and the red to a similar position, when the switch is open. When in repair they cannot be manipulated so as to mislead any one acquainted with them.

The statute manifestly refers to such signals as are complete within themselves, and not subsidiary parts of another device—signals which may be controlled, and by the display of lights or colors, manipulated by the person in charge to communicate information to approaching trainmen, and that can, by the negligence of the operator, be made to speak falsely to the company's servants, to their injury. We, therefore, think the second paragraph fails to state a cause of action, and the demurrer thereto should have been sustained.

In the third paragraph it is alleged to be the duty of the defendant to maintain an unobstructed view between the window of its station house and the target on the switch stand, so that the station agent might see from his position at the window in the station house whether said switch was open or closed, and

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from said position signal to trainmen approaching with their trains the true position of the switch; that the defendant's track was in plain view from the agent's window in the station house, and it was the duty of Orrell, the station agent, and telegraph operator, to look out from his said window and examine the defendant's railroad track, and note the condition of the switches and see that the same were properly set. But the defendant negligently on the day aforesaid maintained at a point midway between the depot and switch stand a large warning board to caution travelers on the highway, and which was so constructed as to completely obstruct the view of the station master, from the switch stand, and completely prevented his observing and noting whether the switch was opened or closed, and from signaling the true condition to those running trains and thereby have averted the accident to the decedent. And the defendant at the time knew of the existence of the said board, and that the same prevented the station agent and telegraph operator from taking note of the condition of the switch from his place at the depot. If the defendant had maintained an unobstructed view of the switch stand from the depot window, and thus have enabled agent Orrell to observe the condition of the switch, he could and would have erected the signal or semaphore in his charge at the depot, and thereby have warned engineer Barker of the open condition of the switch, and thus have avoided the accident. This paragraph is drawn upon the theory that the appellant was guilty of negligence in obstructing a view of the switch from the station window by maintaining in the line of vision a warning board at the country highway crossing, and thus preventing the agent from seeing the open switch, who would, if he had been able to see it, have warned the decedent by erecting a signal or semaphore in his charge. The paragraph is a bad one for more reasons than one. In the first place it is not stated how it became the duty of Orrell to inspect and note the condition of the railroad tracks and switches, whether by rule, or contract, or custom, which omission carries the material fact clearly within the rule declared in *Pittsburg, etc., Co. v. Lightheiser*, and *Pittsburg v. Peck*, *supra*. In the second place the distance between the station house and the switch stand is not given, and there is no allegation stronger than a mere recital that the station agent could have seen the target on the switch stand if the warning board had not intervened. Neither is it averred, except by inference, that there was a semaphore signal available to the agent at the station, nor that he could otherwise have signaled the decedent that the switch was open. The demurrer to the third paragraph should also have been sustained.

It is apparent that the fourth paragraph of the complaint is founded on the fourth clause of section 1 of the employer's liability act (section 7083, Burns' Ann. St. 1901), and relies

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upon the negligence of one Orrell, alleged to be in the employ of the defendant, as station agent and telegraph operator, and in charge of the semaphore signal at the Quincy Station. It is alleged that on December 30, 1902, the defendant maintained at Quincy, as a part of its railroad system, a side track connected a short distance north of the station house with the main track by a switch, which switch was operated by means of a switch stand and other devices; that the switch stand had constructed at the top certain painted wings as targets, designed and used by the defendant as a means of informing its servants engaged in operating its trains of the condition of the switch, as to being open or closed; that the switch targets are in full view from the station house, and in the station house the defendant maintains a semaphore signal, which, on the 30th day of December, 1902, was in charge of one A. L. Orrell, who was employed by the defendant for the purpose of managing and controlling said semaphore, and which signal was used as a sign to trainmen operating trains on the defendant's railroad whether the main track was in good condition and safe for them to proceed, and whether said switch was open or closed; that the switch targets were in full view from the station house, and but 400 feet distant therefrom, and Orrell was present at the station and engaged in his said employment; that the switch was open and had been left open continuously for 40 minutes before the arrival of the train in charge of the decedent and before the same was due to arrive, and the target on the switch stand during all the said time showed red, indicating that the switch was open and the main track unsafe; that it was the duty of Orrell, before the arrival of trains, to look out of his station window and examine the defendant's railroad track, and ascertain the condition, and observe and note the condition of the switches, and whether open or closed; and that for 40 minutes before the arrival of Barker's train the target of the switch stand indicated that the switch was open, and Orrell could, and with the exercise of reasonable diligence would, have seen that the switch was open and could have raised his semaphore danger signal in time to have enabled the decedent to have stopped his train before the same ran into said open switch, but said Orrell carelessly and negligently set said semaphore signal so as to indicate to the decedent that said main track was clear and safe, when he well knew or might, with reasonable diligence, have known, that said track was not clear and safe. By reason of said negligence and the display of said erroneous signal by Orrell the decedent was misled and ran his train at great speed into said open switch, collided with other cars, and was killed. In this paragraph there are sufficient averments that the company maintained at Quincy, within plain view of the telegraph operator and station agent, a switch stand surmounted with painted wings

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or blades that indicated automatically whether said switch was open or closed, and that it also maintained at its Quincy station a semaphore signal that was in charge of one Orrell, who was employed by the company to operate the same for the purpose of informing appellant's servants who were engaged in operating trains running over appellant's road of the condition of the track, as to whether it was clear and safe for them to proceed, or obstructed and dangerous, and whether the switch was open or closed. It is also averred that it was the "duty" of Orrell before the arrival of trains to look out of the window and examine the defendant's track, and observe and note the condition of the said switch, as to being open or closed, and to signify by the use of the semaphore the safe or unsafe condition of the track and switch to those employees approaching the station with their trains; but, as in the preceding paragraphs, there is a total failure to inform the court by averment how it became Orrell's duty to inspect the switch before the arrival of trains, whether it was enjoined upon him by the terms of his contract of employment, as it was to operate and control the semaphore, or whether by a rule of the company, or by a prevailing custom, or whether it sprang from the mere surmise of the pleader. If it was not a duty of his employment to inspect the switch, his failure to do it would not be negligence. The language falls far short of alleging that Orrell was employed by the defendant for the purpose of inspecting the switch and track before the arrival of trains, and to communicate to approaching trainmen, by means of the semaphore, the true condition they were in. From the language used the purpose of the employment by defendant was limited to managing and controlling the semaphore, to communicate to trainmen operating trains on the defendant's railroad whether the track was in good condition and safe to proceed, and whether the switch was open or closed. From the averments we cannot infer that it was the duty of Orrell to determine the condition of the switch. See authorities heretofore cited.

There are other questions arising upon appellant's motion for judgment on the answers to interrogatories and upon the overruling of its motion for a new trial that are left unconsidered because not likely to arise again upon a retrial.

The judgment is reversed, with instructions to sustain the demurrer to each the first, second, third, and fourth paragraphs of the complaint, and for further proceedings not inconsistent with this opinion.

Judgment reversed.

BUSSEY v. CHARLESTON & W. C. RY. CO.

(Supreme Court of South Carolina, Oct. 8, 1907.)

[58 S. E. Rep. 1015.]

Master and Servant—Injury to Servant—Contributory Negligence—Violating Abrogated Rule.*—A section master killed by collision of a train with his hand car was not guilty of contributory negligence by violating the company's rule, providing for the sending of a flagman ahead; it having been abrogated by accustomed disregard thereof, known to and acquiesced in by the company's representative, the road master, whose duty it was to furnish rules and supervise the work of the division.

Same—Rules of Master—Reasonableness—Question for Court or Jury.—Conflicting expert testimony as to the necessity for the rule of a railroad company, that a section master approaching a curve on a hand car shall stop and send a flagman ahead, does not raise an issue of fact on which the reasonableness of the rule depends, in which case only is the reasonableness of the rule one for the jury, instead of the court; but such an issue is raised by evidence that another rule required the section master to go over his section at least every other day, and that it was impossible for him to do so if he stopped at curves to send ahead a flagman.

Same—Negligence—Evidence.—Evidence of negligence, in an action for death of a section master from collision with his hand car of a special freight, held sufficient to go to the jury.

Same—Fellow Servants—Railroads.—Under Civ. Code Ga. 1895, § 2610, providing that, except in case of railroad companies, the master is not liable to one servant for injuries from the negligence of other servants about the same business, a railroad company is liable for injury to an employee from negligence of his fellow servants.

Same—Negligence—Presumption.†—Under the law of Georgia, in

*For the authorities in this series on the subject of contributory negligence and assumption of risk where employees fail to comply with their master's rules or orders, see foot-notes appended to *Huggins v. Southern Ry. Co.* (Ala.), 24 R. R. R. 518, 47 Am. & Eng. R. Cas., N. S., 518; foot-notes appended to *St. Louis, etc., Ry. Co. v. Caraway* (Ark.), 22 R. R. R. 532, 45 Am. & Eng. R. Cas., N. S., 532; *Pittsburgh, etc., Ry. Co. v. Lichteiser* (Ind.), 22 R. R. R. 130, 45 Am. & Eng. R. Cas., N. S., 130.

For the authorities in this series on the subject of waiver and implied abrogation of rules made for the guidance and protection of railroad employees, see foot-notes appended to *McCarthy v. Pennsylvania R. Co.* (N. Y.), 24 R. R. R. 684, 47 Am. & Eng. R. Cas., N. S., 684; foot-notes appended to *Huggins v. Southern Ry. Co.* (Ala.), 24 R. R. R. 518, 47 Am. & Eng. R. Cas., N. S., 518.

†For the authorities in this series on the question whether a presumption of negligence on the part of the master or his representa-

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case of injury to an employee, on its being shown that he was without fault, there is a presumption of negligence of the master.

Appeal—Review—Harmless Error—Instructions.—The substance of a rejected charge having been given in the charge of the court, any error in holding it to be a charge on the facts is harmless.

Master and Servant—Injury to Employee—Negligence—Evidence.‡—Though, under the law of Georgia, failure of a train to give the statutory signal at a crossing cannot be considered as negligence per se, in the matter of the collision of the train with a hand car three-quarters of a mile from the crossing, yet it may be considered as an item of evidence tending to establish negligence.

Appeal—Review—Questions of Fact.—There being evidence of defendant's negligence to go to the jury, the refusal of a motion for new trial on the ground that the verdict for plaintiff was against the weight of evidence will not be disturbed.

Same.—It is not error of law for the court, in denying a motion for new trial, to state as conclusions facts not sustained by the evidence.

Death—Damages—Expectancy of Life—Evidence.—Under the law of Georgia, the jury are not limited to the mortality and annuity tables in estimating the value of a life.

Appeal from Common Pleas Circuit Court of Edgefield County; R. Withers Memminger, Judge.

Action by Elizabeth J. Bussey, administratrix of John C. Bussey, deceased, against the Charleston & Western Carolina Railway. Judgment for plaintiff. Defendant appeals. Affirmed.

S. J. Simpson and Sheppard Bros., for appellant.

J. Wm. Thurmond and James H. Tillman, for respondent.

POPE, C. J. This action was brought in July, 1905, by the plaintiff, Elizabeth Bussey, as administratrix of John C. Bussey, deceased, against the defendant railway company, to recover damages for the alleged wrongful death of the intestate herein. The deceased was in the employment of the defendant railway as a section master, having under his control a section of road reaching from the neighborhood of Woodlawn, a station just on the south side of the Savannah river, to Lulaville, a station in Georgia. On the 25th of February, 1905, deceased, together

ative arises from the fact that one of his servants is injured, see foot-notes appended to *Elliot v. Kansas City, etc., R. Co. (Mo.)*, 24 R. R. R. 740, 47 Am. & Eng. R. Cas., N. S., 740; foot-notes appended to *Southern Ry. Co. v. Carr (C. C. A.)*, 24 R. R. R. 699, 47 Am. & Eng. R. Cas., N. S., 699.

‡For the authorities in this series on the question whether it is actionable negligence to have failed to give crossing signals where the accident was not at the crossing, see *Everett v. Great Northern Ry. Co. (Minn.)*, 23 R. R. R. 259, 46 Am. & Eng. R. Cas., N. S., 259.

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with his men, were on the road working towards Augusta. They stopped at Woodlawn, where, according to the testimony introduced by the plaintiff, they had dinner, and, Mr. Bussey having learned from the agent at this place that the track was clear, they continued their work up the road. After leaving Woodlawn some distance, they were proceeding around a curve in the road, their hand car moving upgrade at the rate of 20 miles an hour, when they were run into by an extra freight train, and Bussey was killed. The plaintiff alleged negligence on the part of the defendant in not notifying the deceased of the approach of the extra train; in failing to blow the whistle at Snead's Crossing, a public crossing three-fourth of a mile from the scene of the accident; in coming around the curve at a high rate of speed without having the train under control; failure to blow at the curve, as was customary; and, finally, failure of the engineer to apply the brakes and stop the train before striking the car of deceased. The defendant denies that it was negligent in any of the above particulars, and alleges that it was not its duty to give deceased notice of the extra train, and that his injury was caused by his own negligence in not sending a flagman ahead, as he, according to the rules under which he was employed, was bound to do. The case came on for hearing at the October, 1906, term of court for Edgefield county. Judge Memminger having refused defendant's motion for a nonsuit, the case went to the jury and resulted in a verdict of \$15,000 for the plaintiff. Thereupon defendant made a motion for a new trial, and, it also having been refused, it now appeals to this court, alleging error in a number of particulars.

In disposing of the exceptions, the first question naturally arising is whether or not the rule requiring section masters to send ahead flagmen had been abrogated. The plaintiff introduced evidence in reply tending to show an accustomed disregard of the rule. Whether this evidence was admissible depends upon the fact whether the disregard was brought home to the defendant company. Certainly secret and occasional violations of the rule by employees are not admissible to prove its abrogation. 20 Am. & Eng. Ency. 107, and authorities; *Binion v. Railway*, 118 Ga. 282, 45 S. E. 276. It must be shown that the failure to observe such regulation is sufficiently well known to the master to raise the presumption that by acquiescence in its violation the rule had been annulled. In this, as in all other cases, knowledge of the representative is knowledge of the master, and therefore if knowledge is brought home to such representative, and such acquiescence on his part is shown, the rule cannot relieve the master. *Railway Co. v. Collarn*, 73 Ind. 261, 38 Am. Rep. 134; *Baulec v. Railway*, 59 N. Y. 356, 17 Am. Rep. 325; 20 A. & E. Ency. 108. The evidence here objected to tended to show an ac-

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customed disregard of the rule by all section masters, and that even Stillwell himself, who was the road master, and whose duty it was to furnish rules and supervise the work of his division, regularly traveled without sending flagman ahead. We think the only reasonable inference from the testimony is that Stillwell had notice of the violation of the rule. His duties, being those of the master, made him the representative of the master. Therefore his knowledge was the master's knowledge. The purpose of the evidence was to show that the rule was constantly violated by both the servants and the representative of the master; that it was so universally disregarded that the only reasonable inference was that the master had notice of and acquiesced in the violation. This being so, even granting that the rule was promulgated by Kenley, the result would not be effected. The question here is: Was the violation of the rule brought to the knowledge of the master, and did he acquiesce in it? Its determination was for the jury. It is quite true that rules are necessary for the conduct of the complex business of railroads and should be given effect. No organization composed of many departments can be successfully managed where there is an absence of system and regulation. Where such rules are established and promulgated in some reasonable way, and employees have knowledge of them, they are binding, and the duty devolves upon employees to obey them. Many rules are, however, adopted which, when they are attempted to be put into practice, prove impracticable, and without being expressly revoked they are allowed to be constantly violated. Such abrogated rules cannot in a true sense be regarded as rules, and employees are not guilty of negligence in violating them. They are not a scale by which servants' acts are to be measured as to whether or not they are negligent. Care and diligence are not governed by them. *Pa. Co. v. Roney*, 89 Ind. 453, 46 Am. Rep. 173; 1 Labatt on Master and Servant, pp. 315, 511. We are of the opinion therefore that the evidence was properly admitted, and that the court was correct in leaving it to the jury to decide whether the rule had been abrogated.

Under this view, if the jury found that the rule was not abrogated, then the question as to the reasonableness of the rule becomes important. Was it proper to submit this question to the jury? There seems to be much conflict of authority on this subject. In volume 1, at page 508, of his work on Master and Servant, Labatt says: "Whether reasonableness of a rule is a question for the court or the jury is one as to which there is much conflict of authority. One theory is that the question is always for the court; the reason for this view being that it would otherwise be impossible to secure a uniformity of view or to insure the rule pronounced unreasonable by another jury in

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a subsequent case. Another view is that the question is primarily one for the jury. Some courts have enunciated an intermediate doctrine which seems to be more in harmony with general principles, viz., that reasonableness of a rule is a mixed question of law and fact, except in plain cases." The rule is thus laid down in 20 A. & E. Ency. 104: "Rules adopted by employers engaged in a complex and dangerous business are presumably selected as the best for avoiding injuries to their employees, and unless clearly shown to be unreasonable and insufficient the master should not be charged with negligence in adopting them.

* * * Whether or not a rule adopted by the master for the conduct and government of his employees is reasonable is a question of law for the court." In Elliott on Railroads, § 202, we find: "The reasonableness of such regulations and the manner of their enforcement in a given case has been held by some of the courts to be a question of fact for the jury. But it would seem that this must be a question of law for the courts to decide, if any fixed or permanent regulations are to be established, and the better authority holds it to be such, since one jury in a given case might pronounce the rule reasonable, while another jury in another case might decide the rule to be unreasonable.

* * * There are many cases in which the reasonableness of the rule depends, in the particular instance, upon disputed facts and circumstances, and where this is true it may perhaps be called a mixed question of law and fact; but, when the facts are undisputed, we think it clear both upon principle and according to the weight of authority that the question is one of law for the court." Again, Thompson, in his work on Trials, says, at section 1057: "Whether a certain rule of a railway corporation is reasonable, and therefore valid, is a question of law for the court; the general rule being that the reasonableness of the by-laws, rules, and regulations of corporations, whether private or municipal, is to be decided as a question of law. And it is improper to submit the question of the reasonableness of such a by-law, ordinance, or regulation to the jury for decision." The practice in our state seems to be in accord with these authorities. *Broom v. Tel. Co.*, 71 S. C. 506, 51 S. E. 259; *State v. Earle*, 66 S. C. 202, 44 S. E. 781; *Gideon v. Enoree Mfg. Co.*, 44 S. C. 442, 22 S. E. 598. Therefore the plaintiff must show that there was an issue of fact raised to entitle the submission of the question to the jury. In her endeavor to do this, she contends that the defendant after putting the rule in evidence produced witnesses to prove the necessity, which is practically identical with the reasonableness of the rule; that reply was made by the plaintiff, and thus an issue of fact was clearly raised. This point is not well taken. We are unable to see where the disputed fact or facts come in. The evidence introduced by the defendant was

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merely the expert opinion of the witnesses as to the necessity of the rule. It is true that the facts are stated upon which the rule is based, but nowhere in the plaintiff's reply can we find these facts contradicted. A contradiction of an opinion merely could raise no issue of fact. It would raise simply the original question of necessity or reasonableness that the court is called upon to decide. There is the fact, however, that, according to rule 1,009 of the defendant railway, the deceased was required to go over his section of road at least every other day. There was testimony to the effect that this was impossible if plaintiff's intestate had stopped at curves to send a flagman ahead. This, then, raises a question of fact, and makes the reasonableness of the rule, so far as the deceased was concerned, a question for the jury.

From the consideration of the question above, it is clear that the nonsuit was properly refused; the ground of the motion being that the plaintiff was negligent. The evidence raised issues which had to go to the jury on this point. *Binion v. Railway*, 118 Ga. 878, 36 S. E. 938. If, after consideration of the testimony, the jury found that the deceased was justified in violation of the rule in question, then, so far as the plaintiff's testimony was concerned, her intestate was free from fault in bringing about the injury. Nor according to the plaintiff's testimony was the defendant so absolutely absolved from negligence as to warrant such a course. It was in evidence that the defendant's agent informed the deceased that the track was clear; that the defendant's agents were rounding the curve with a special train at a rapid rate of speed; that no signal was given, nor was the train under control. These, together with the other alleged acts of negligence, were sufficient to carry the case to the jury.

The circuit judge charged the jury that a servant of a railroad company does not assume the risks caused by the negligence of the company or its employees acting in the scope of their duties, and such risks cannot be said, under the law, to be incident to his employment, and assumed by him. The appellant endeavors to show that this is an incorrect proposition of law, in that it makes the master liable for injuries caused by the negligence of fellow servants. Section 2610 of the Civil Code of Georgia of 1895 declares that, except in case of railroad companies, the master is not liable to one servant for injuries arising from the negligence or misconduct of other servants about the same business. *Gun v. Willingham*, 111 Ga. 427, 36 S. E. 804. The plain implication, and in fact the holding in Georgia, is that, where an employee of a railroad company is injured by the negligence of a fellow servant, the master is liable. *Ry. v. Worley*, 92 Ga. 84, 18 S. E. 361; *Railey v. Garbutt*, 112 Ga. 288, 37 S. E. 360. Therefore this contention must be overruled.

The fifth exception alleges error on the part of the circuit

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court in charging the jury that, if it was affirmatively shown that the intestate was without fault himself, a presumption of negligence would arise against the defendant, and the burden of proof would be upon the defendant to show that it was not negligence. The charge, according to the doctrine prevailing in Georgia, is correct. The cases make a distinction between injuries to employees and those resulting to third persons. In the latter case, immediately upon the happening of the injury, the presumption arises that the master was negligent, which presumption it is incumbent upon him to overcome. In the former case, where the plaintiff was taking part in the act during the performance of which he was injured, before the presumption will arise, he must show that he was free from fault in bringing about the mishap. When this is done, the presumption is identical with that in cases of injuries to persons not employees. *Railway v. Vandiver*, 85 Ga. 470, 11 S. E. 781. The presumption is, of course, by no means conclusive, and even very slight evidence on the part of the defendant may dispel it. This being the law, there was no error in the charge.

Again, error is alleged in refusing to charge the following request, and in holding it to be a charge upon the facts: "So, if you find that Bussey neglected to send forward a flagman on the occasion in question, if his duty required him so to do, and that he took the risk of being on the track with his hand car, without a flagman ahead of his car when run into by the train, then I charge you that the plaintiff is not entitled to recover, even if you find that the company was also negligent, and if these were the facts you should find for the defendant." This exception cannot be sustained. Throughout his charge the circuit judge was apparently anxious to impress upon the jury the fact that, if the deceased was in any way to blame for the injury resulting to himself, the plaintiff could not recover. That if he neglected his duty in failing to send forward a flagman, he was blamable, is stated in a number of instances. Thus, at folio 590, he uses this language: "To find such section master free from fault, you should find from the evidence, if there is any such evidence, that at the time of his injury on the railway curve in question, if there was any such curve, that he was doing everything that his employers required him to do for his protection, and had sent out a flagman to flag approaching trains, if his duty required him to send out such flagman. If his duty required him to send out such flagman, and he failed to do so, you will not be authorized to find Mr. Bussey free from fault." Again, at folio 598, he says: "And if you find that such rules notified him that extra trains would run without notice, and that he should not run around curves without a flagman in advance, then I charge you that he was bound to obey such rule, and had

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no right to substitute any other rule or measure of diligence, but must obey that prescribed by his employer, unless he was authorized in ignoring the rules with the knowledge and acquiescence of the company or those in authority to promulgate and enforce same." And, again, he charged, at folio 610: "The court charges you that if you find from the evidence that it was the duty of the employee, Bussey, to send forward flagman to flag the curve in question, as against the approaching trains, and that such flagging was required to be done by Bussey as an act of precaution under the rules and regulations of the company, if there were such rules, of which he had notice, if he did have notice, and that Bussey failed so to flag on the occasion in question, and as a result thereon was killed by an approaching train, then I charge you that such failure to obey the rules would be such an act on his part as would prevent any recovery in this case." Clearly, from these quotations, the substance of the rejected charge was given to the jury, and, even were the circuit judge in error in holding it a charge upon the facts, it was immaterial and harmless.

The judge instructed the jury that the failure of the defendant to give the signal at Snead's Crossing could not be considered as negligence per se, with respect to the deceased, but that it might be considered only as an item of evidence tending to establish negligence. The defendant alleges that this was error. An examination of the Georgia cases will show that they sustain the circuit judge. In the case of *Railway v. Golden*, 93 Ga. 510, 21 S. E. 68, we find this language: "But this court, so far as I know, has never held, relative to a person that distance from a crossing, that the omission to give the signal required by law is negligence per se, as was charged in this case by the trial judge. It has been held that the evidence of noncompliance with the statute by the servants of the railroad company is admissible, and the jury may be instructed by the judge that they may consider it. This, I think, is as far as the court has gone on the subject." In the very strong opinion in the case of *Railway v. Gravitt*, 93 Ga. 369, 20 S. E. 550, the court lays down the same rule. The purpose of such a holding is clear. The neglect to blow the whistle at the crossing, as defendant's duty required, has a tendency to show a negligent or reckless disregard of duty. This fact, together with other facts, may form a chain bringing home to the defendant the negligent act complained of, and for which it is sought to be held responsible. It may be very important, or it may be of no value at all. It is just so much evidence as the jury may take into consideration and give such weight as to them seems proper.

Finally, we consider the question whether it was error on the part of the trial judge to refuse a new trial. It is well settled

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that for error of fact this court is without power to review the circuit court's action. Therefore, to entitle the defendant to a new trial, error of law must be shown. The first alleged error, based upon a number of subdivisions alleging error, is that the verdict should have been set aside because it was contrary to the overwhelming weight of the testimony. Without taking up the subdivisions separately, we hold that the grounds alleging error because of a lack of proof of negligence cannot be sustained. These questions were properly submitted to the jury, and, they having reached a verdict, this court will not interfere upon the ground that the finding is against the weight of the testimony. *Ruddell v. Railway*, 75 S. C. 291, 55 S. E. 528; *Cain v. Railway*, 74 S. C. 89, 54 S. E. 244. Likewise, it has been held that it is not error of law for a judge in overruling a motion for a new trial to state as conclusions facts not sustained by the testimony. *Caldwell v. Railway*, 73 S. C. 443, 53 S. E. 746. Therefore these grounds must be overruled. Nor can we see that the circuit judge attempted to lay down any new rule as regards master and servant in his order. His intention was to say that a railroad company could not lay down a rule and in contemplation of such rule act in entire disregard of the rights of the employee.

The eleventh exception raises the point that under the Georgia statute and the decisions of that a verdict of \$15,000 was illegal and excessive, in that it was more than the amount that could, by the rules established by the courts of Georgia, have been fixed by the jury as the value of the life of the deceased. According to these rules, the plaintiff is allowed to recover for the full value of the life of his or her intestate. The difficulty is in arriving at the value of the life. The defendant contends that the proper and only method is to use the mortality and annuity tables, find from the former the number of years the deceased probably would have lived, find from the latter the amount of \$1 for that time, and multiply that amount by the yearly earnings of the deceased. This is a correct statement of the general rule when the tables are used, but the jury are not bound to use the tables in estimating the value of a life. *Railway v. Clark*, 117 Ga. 548, 44 S. E. 1; *Railway v. Burney*, 98 Ga. 1, 26 S. E. 732. And even when the tables are used there is no iron-clad law holding the jury down to them. As was said by Justice Lumpkin, in what he thought would be a proper charge for the trial judge as set out in the case of *Burney v. Railway*, *supra*: "In estimating the probable length of a given man's life, as compared with the average duration of life of one of the same age, his health, occupation, habits, and surroundings, just as they are disclosed by the evidence, ought to be considered, and proper weight be given to all these things in fixing the expectancy

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of the life, diminishing or increasing the figures laid down in the tables according to the facts in the particular case under investigation. * * * If in any case the expectancy of the person under consideration would, under the evidence, have been properly greater or less than that of the average man, the amount of damages to be allowed should be increased or diminished accordingly. * * * Feebleness of health, actual sickness, the loss of employment, voluntarily abstaining from work, dullness in business, reduction in wages, the increasing infirmities of age, the corresponding diminution of earning capacity, and other causes, may contribute to a greater or less degree to decreasing the gross earnings of a lifetime. All should be taken into consideration." We take it for granted that the jury properly considered all of these matters, and reached their verdict only after careful deliberation. The circuit judge, who was present and heard the testimony, by his refusal to grant a new trial, expressed his approval of the verdict. This court therefore holds that it is correct.

Nor can we sustain the exception that the new trial should have been granted because the verdict was contrary to the charge of the court. The jury were instructed that in order for the plaintiff to recover she must show that her intestate was free from fault, and that, if both he and the defendant were free from fault, there could be no recovery. As was said above, the whole question of negligence was submitted to the jury, and they, having found a verdict for the plaintiff, thereby made it known that they found the facts such as would sustain a verdict. Therefore this court cannot set it aside.

It is the judgment of this court that the judgment of the circuit court be affirmed.

PAGAN *v.* SOUTHERN RY. CO.

(Supreme Court of South Carolina, Oct. 26, 1907.)

[59 S. E. Rep. 32.]

Master and Servant—Injuries to Servant—Fellow Servants—Assumption of Risks.*—When one takes employment under another, he assumes in general the natural and ordinary risk of such employment, which includes the negligence of a fellow servant whom the employer has selected with due care.

Same—Test.—Whether a person by whose negligence a servant is injured is a vice principal or a fellow servant does not depend on a difference of grade, rank, or authority, but on the character of the act performed by the offending servant, as to whether it is the performance of a duty which the master owed to the injured servant and intrusted to the offending servant to perform.

Same—Duties of Master.†—The duties imposed by law on a master are to furnish safe and suitable appliances, to see that they are kept in proper repair, to provide a safe place to work, to employ a sufficient number of servants to perform the labors of their employment, and to select competent servants.

Same—Railroads.—Prior to the adoption of Const. 1895 the fellow-servant rule was applicable to railroads.

Same—Engineer and Brakeman.—A railroad's rules provided that the conductor should have charge of the train, that enginemen were jointly responsible with conductors for the movement and protection of their trains, and that they should see that brakemen riding on their engines promptly returned to their positions whenever necessary, and required brakemen, when their trains were running, to ride on top of them and to respond to the engineer's call for brakes, and to set brakes without call from the engineer when necessary, and report to and receive instructions from the trainmaster, and obey orders from the conductor. Held, that a brakeman on a freight train was not under the direct control of the engineer, within Const. 1895, art. 9, § 15, authorizing a railroad employee to recover for injuries resulting from the negligence of a superior having the right to control or

*For the authorities in this series on the question whether railroad employees assume risks from their fellow servants' negligence or incompetency, see foot-notes appended to *Kansas City, etc., Ry. Co. v. Loosly* (Kan.), 24 R. R. R. 712, 47 Am. & Eng. R. Cas., N. S., 712.

†See foot-notes appended to *Morrison v. San Pedro, etc., R. Co.* (Utah), 22 R. R. R. 690, 45 Am. & Eng. R. Cas., N. S., 690; foot-notes appended to *Neagle v. Syracuse, etc., R. Co.* (N. Y.), 22 R. R. R. 89, 45 Am. & Eng. R. Cas., N. S., 89; foot-notes appended to *Cincinnati, etc., Ry. Co. v. Hill's Adm'r* (Ky.), 22 R. R. R. 52, 45 Am. & Eng. R. Cas., N. S., 52; *Mississippi Cent. R. Co. v. Hardy* (Miss.), 21 R. R. R. 1, 44 Am. & Eng. R. Cas., N. S., 1.

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direct his services, but that the engineer and the brakeman were fellow servants.

Same—Engineer and Fireman.‡—An engineer is a vice principal and not a fellow servant of his fireman, within Const. 1895, art. 9, § 15, giving to railroad employees the right to recover for injuries sustained by the negligence of a superior having the right to control or direct the services of the party injured.

Appeal from Common Pleas Circuit Court of Richmond County; Geo. W. Gage, Judge.

Action by Norman P. Pagan against the Southern Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Logan & Edmunds and Nelson & Nelson, for appellant.
E. M. Thomson, for respondent.

WOODS, J. This appeal from an order of nonsuit depends on whether a railroad company is liable to the plaintiff, who was a brakeman, for an injury received from being thrown from a freight train by the negligence of the engineer in suddenly and without warning checking the speed of the train. The general rule in this state as to the negligence of fellow servants is thus stated in *Brabham v. Telegraph Co.*, 71 S. C. 56, 50 S. E. 717: "When one takes employment under another, he assumes the natural and ordinary risk of such employment, which includes the negligence of a fellow servant whom the employer has selected with due care. In determining who are fellow servants, the test or rule in this state is not whether the servants are of different grade, rank, or authority, one of them having the authority to control and direct the services of another; but the test is in the character of the act being performed by the offending servant, whether it was the performance of some duty the master owed to the injured servant, the performance of which duty the master had intrusted to the offending servant." The duties imposed by law on the master are: "(1) To furnish safe and suitable appliances, and to see that they are kept in proper repair; (2) to provide a safe place to work; (3) to employ a sufficient number of servants to perform the labors of their employment; (4) to select competent servants." Until the adoption of the Constitution of 1895 these general rules in their full force applied to railroads, and exempted them from all liability to an employee for the negligence of a fellow servant; and under these rules an engineer and a brakeman were held to be fellow servants. Boat-

‡For the authorities in this series on the question whether a locomotive engineer is a vice principal or fellow servant with respect to other employees of his company, see foot-notes appended to *Bradford Construction Co. v. Heflin* (Miss.), 24 R. R. R. 483, 47 Am. & Eng. R. Cas., N. S., 483.

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wright v. Railroad Co., 25 S. C. 128; Evans v. Chamberlain, 40 S. C. 104; Lyon v. C. & W. C. Ry. Co., 77 S. C. 336, 58 S. E. 12. By article 9, § 15, of the Constitution of 1895, employees of railroads are given the same right of recovery as a person not an employee: (1) where the injury results from the negligence of a superior officer or agent; (2) where it results from the negligence of a superior having the right to control or direct the services of the party injured.

The conductor is the officer and representative of the railroad company in charge of the train; and the entire train crew, including the engineer, is subject to his orders. The railroad rules introduced provide that the conductor shall have charge of the train to which he is assigned, and the direction and control of all persons employed thereon. The plaintiff relies mainly on the following rules to show that the engineer is the superior of the brakeman, and that the brakeman is under his control or direction:

"Rule 502. As to Enginemen. They are jointly responsible with the conductor for the movement and protection of their train in accordance with the rules; and while they must obey all proper orders by the conductor or others, as provided by the rules, they are individually responsible for the observance of the rules relative to their duties, and must decline to obey any order by the conductor, or any other person which involves the violation of such rules, or peril to persons or property."

"Rule 516. * * * They must maintain, as far as practicable, regular and uniform speed, and must avoid sudden increase or checking of speed, except when necessary to prevent accident. They must avoid excessive speed on downgrades, and run with due caution where the track is under repair, and at all points where there is reason to apprehend danger."

"Rule 545. * * * They must see that brakemen who are riding on their engines promptly return to their positions on the train whenever it is necessary."

The engineer is in charge of the engine, and, though subject to the orders of the conductor, it is essential that he should exercise a degree of discretion in the management of his engine. He has no authority over the brakemen, except to require them to leave the engines and return to their positions on top of the train; and it is to be observed, under the rules, the brakeman is never on the engine in the discharge of a duty, but only in taking temporary refuge in extremely cold or stormy weather. On the other hand, the brakemen are in charge of the brakes on freight trains, and, though subject to the orders of the conductor, they also are required to exercise a degree of discretion in the discharge of the duty imposed on them, as appears by the following rules and others introduced in evidence (the

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portions of these rules we have italicized shows this discretion in some circumstances extends to complete control of the train):

"Rule 663. As to Brakemen. When their trains are running they must ride on top of them, and *in such positions as to be able to control* them most effectually and to pass signals the whole length of the train."

"Rule 666. * * * When the control of the train is dependent wholly or in part upon the manual application of the brakes, they must promptly perform this duty at all points where its necessity is apparent, without waiting for a signal from the engineman or directions from the conductor, and under all circumstances they must respond instantly to the engineman's call for manual application of the brakes. They must apply the brakes in such succession as to take up the slack of the train gradually and avoid breaking it in two, must not slide the wheels, and on long grades must release each brake at such intervals as may be necessary to avoid excessive heating of the wheels."

"Rule 659. * * * Freight brakemen will report to and receive instructions from the trainmaster. When on duty they must obey the orders of the conductor."

As the engineer is in charge of the engine, so is the brakeman in charge of the brakes—both exercising a degree of control over the management of the train, both subject to the orders of the conductor, but not of each other. The fact that the management of the engine requires greater intelligence and more discretion than the management of the brakes does not constitute the engineer an officer or agent superior to the brakeman. To make the superiority of the officer or agent, within the meaning of the Constitution, depend on the shades of intelligence or discretion required in carrying out the rules of railroad companies, would be to sweep away the whole fellow servant doctrine as applied to railroads, in opposition to the clear meaning of the Constitution. Nor does the requirement that the brakeman shall respond to the signals of the engineer determine the relation. The engineer, and even conductor, must respond to the signals of flagman and switchmen; but responding to a signal in obedience to a rule requiring response obviously does not signify that the employee that gives the signal is a superior officer or agent, or that he has a right to control or direct the services of him who acts on it.

The relation of a fireman to an engineer is entirely different from that of the brakeman. The fireman works on the engine as the immediate subordinate of the engineer who directs his service. As to him we do not see how it could be doubted the engineer would be, under the Constitution, a person for whose negligence the railroad company would be liable. The force of the reasoning and the weight of the authority of the cases so

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holding are fully recognized. *So. Ry. Co. v. Cheaves*, 36 South. 691, 84 Miss. 565; *Ragsdale v. Railroad Co.* (C. C.) 42 Fed. 383. But these cases do not discuss and have no application to the relation of engineer and brakeman.

In *Evans v. L., N. O. & T. Ry. Co.*, 12 South. 581, 70 Miss. 527, the Supreme Court of Mississippi decided the precise question here under consideration; the constitutional provision of that state being the same as ours. In discussing the relation of engineer and brakeman, the court thus clearly states the meaning of the Constitution: "As to these the relation of superior and subordinate does not exist, but they are coequal, co-ordinate co-operators, each with a part to perform, like different members of the human body—each with appropriate functions, some with greater or less honor, it may be, but all necessary coefficients in the complete whole. Neither can say to the other, 'I have no need of thee,' or claim superiority or right to control or direct the service of the other in obeying the rule prescribed for and obligatory on all alike. Their relation is correlative. They have reciprocal duties in enforcing the rules of a common superior for the successful operation of the train, and superiority or right to control, in the sense of the Constitution, cannot be affirmed of them. The constitutional provision has reference to a superior agent or officer of the sort well known as such, and any other person in the company's service, by whatever name, who may be invested with the right to control or direct the services of others, according to his discretion and judgment, one to whom is committed the discretion or control of others for the accomplishment of some end dependent upon his independent orders born of the occasion, springing from him as director, and not consisting of the mere execution of routine duties in pursuance of fixed rules by various employees, each charged with certain parts in the general performance." In construing a statute similar in terms to our constitutional provision, the Supreme Court of Ohio also held the engineer and brakeman not to sustain the relation of superior and subordinate. *Cleveland, etc., Ry. Co. v. Shanower*, 71 N. E. 279, 70 Ohio St. 166.

We are of the opinion that an engineer of a freight train is a fellow servant of the brakeman, and is not a superior officer or agent, nor a person having a right to direct or control the services of the brakeman. The railroad company, therefore, is not liable for an injury to a brakeman caused by the negligence of the engineer on the same train.

The judgment of this court is that the judgment of the circuit court be affirmed.

HEMMINGSSEN *v.* CHICAGO & N. W. RY. CO.

(Supreme Court of Wisconsin, Jan. 28, 1908.)

[114 N. W. Rep. 785.]

Master and Servant—Death of Servant—Contributory Negligence—Question for Jury.—In an action for death of a railroad brakeman by being crushed between a platform and a moving freight car, where he had gone in the course of his duty, evidence held to require submission of the question of his contributory negligence in attempting to stand in such place while the car was passing him to the jury.

Same—Assumed Risk—Notice.*—Where a railroad brakeman was crushed between a platform dangerously near the track and a moving car and killed, and it was not claimed that any notice had ever been given him of the particular dangerous platform, a notice served on him prior to the injury that there were obstructions dangerously close to the track, and that he was required to look out for them, was not sufficient to charge him as a matter of law with the assumption of risk or negligence with reference to the particular danger he encountered.

Trial—Special Verdict—Requested Interrogatories.—It was not error to refuse an interrogatory submitted to form part of a special verdict, where the substance thereof was covered by other interrogatories submitted.

Appeal from Circuit Court, Oconto County; Samuel D. Hastings, Judge.

Action by J. Hemmingsen, as administrator of the estate of George F. Parks, deceased, against the Chicago & Northwestern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

This action was brought to recover for the pecuniary injury resulting to the widow from the death of plaintiff's intestate, employed by defendant as brakeman. The negligence charged is in the construction and maintenance of one of its tracks so near a certain platform as to be "unreasonably and unnecessarily hazardous and dangerous." The jury returned the following verdict:

"First Question: Was the platform between which and the car the deceased, George F. Parks, was crushed, so close to the side track as to render the place unnecessarily dangerous to the

*See foot-notes appended to *Clippard v. St. Louis Transit Co.* (Mo.), 23 R. R. R. 107, 46 Am. & Eng. R. Cas., N. S., 107; foot-notes appended to *Kansas City, etc., Ry. Co. v. Loosley* (Kan.), 24 R. R. R. 712, 47 Am. & Eng. R. Cas., N. S., 712.

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defendant's employees in the performance of their duties at that time? Answer: Yes.

"Second Question: If you should answer the first question 'Yes,' then answer this: Ought a person of ordinary intelligence and prudence and experience as the defendant was, and similarly situated and engaged, to have reasonably anticipated that some injury would result to an employee from the proximity of said track to said platform, while such employee was in the performance of his duty? Answer: Yes.

"Third Question: If you answer the first question 'Yes,' then answer this: Ought a person of ordinary intelligence and prudence, and similarly situated, experienced, and engaged as was deceased, to have observed the nearness of the platform to the track, and comprehended the danger resulting from going between the moving cars and the platform? Answer: No.

"Fourth Question: Did any want of ordinary care on the part of the deceased, Mr. Parks, proximately contribute to his injury, which caused his death? Answer: No.

"Fifth Question: At what amount do you assess the plaintiff's damages? Answer: \$5,000."

Defendant moved for judgment notwithstanding the verdict, that answers to questions 3 and 4 of the verdict be changed, and for a new trial, which were denied, and judgment given for plaintiff on the verdict, from which this appeal was taken.

Edward M. Hyzer, for appellant.

Gill & Chase (Wigman, Martin & Martin, of counsel) for respondent.

KERWIN, J. (after stating the facts as above). 1. The principal contention for reversal is that upon the undisputed evidence the deceased, George F. Parks, was guilty of contributory negligence, and therefore the court should have changed the answer to questions 3 and 4 from "No" to "Yes." On the day of the fatal injury deceased was employed in switching cars on side tracks near the platform at the plant of the Falls Manufacturing Company at Oconto Falls, in this state. While thus engaged he was crushed between the platform and a moving car, and died from the effects of the injuries received. The platform was about 64 feet long and extended east and west along the south side of a warehouse. There were three switch tracks south of this platform numbered 3, 4, and 5, connecting with a three-throw switch located about 6 feet west of the west end of the platform and a little south of the south line of the platform extended. Track No. 3 was nearest to and about parallel with the platform, but varied in distance from the platform at different points from 11 inches to about 2 feet or more from the side of a box car on the track to the platform. The platform also varied

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in height, and was old, uneven in height, and irregular of outline. Near the west end it was about 3 feet 10 inches and at the east end about 4 feet 6 inches above the top of the rail, while in or near the middle it was much higher. The evidence further tends to show that said track No. 3 had been used to place cars that were taken out, and had not been used for spotting or switching much; that neither deceased nor any of the brakemen had been seen doing any work between the platform and side of a passing car on this track before the injury occurred. The train crew engaged at the time of injury consisted of the conductor, engineer, fireman, and two brakemen. There were three cars attached to the engine. One of these had been switched onto one of the tracks south of track No. 3, and the movement in thus switching left the engine and two cars attached west of the switch about half a car length. The next movement was for the purpose of placing the remaining two cars on track No. 3, which was nearest to the platform. The deceased threw the switch, crossed to the south side of the cars, gave the back-up signal, and walked eastward on the southerly side of track No. 3, while the engine and cars backed in upon the track. At about this time the other brakeman called to deceased saying: "All right, George, cut it off, and I will catch it." Upon receiving this order deceased rushed across to the platform in front of the cars and stepped between the rail and the platform at a point near the middle or west of the middle of the platform. The car passed until a projecting handhold extending four inches beyond the side door of the car caught him and rolled him about 15 feet between the platform and the car, causing the fatal injury.

There is no direct evidence that deceased knew the platform was dangerously near the track, nor that he had ever gone between the platform and a moving car at this point before the time of injury. It is true he was an experienced brakeman, and it does not appear why he passed from the south side of the track in front of the backing cars and went between the cars and the platform. The question of whether he was guilty of contributory negligence as a matter of law is not free from doubt and difficulty. In an opinion of the trial court in the record on motion by defendant for a directed verdict the learned trial judge in denying the motion seems to rest his opinion principally upon the fact that deceased never had his attention called to the proximity of the platform to the cars when upon track No. 3, and that the evidence was not sufficient to charge deceased as matter of law with knowledge of the dangerous proximity of the cars to the platform when passing by it. It is said that there was no occasion for deceased to stand between the platform and the moving car. True, it does not appear what his purpose was in so doing. But obviously he had some purpose connected with his duties. If he knew the place was dangerous,

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doubtless he would not have gone there. The question is, should he have known it? In view of the fact that there is no evidence that he or others had ever been called upon before to go between the platform and cars at this point, and the fact that the track was not used much for spotting cars, he doubtless, in the hasty performance of his work, failed to properly estimate the distance at the particular point where he entered. Counsel for appellant argues that deceased crossed over to the platform, leaned against it, and waited for the car to back up, and that he was then in a position to know the danger, but that he stood there intending to uncouple the cars with the pin lifter when the engine reached him, and that he assumed an unsafe place, when he could have safely uncoupled on the south side. The engineer was on the north side, and the evidence shows it was preferable to give the signal on that side. He doubtless went there to give the signal and uncouple the cars, and unless he knew or ought to have known the danger he was not guilty of negligence. There is evidence also that when he rushed across to the platform the cars were backing opposite him. But we think that whether he knew or ought to have known of the danger was for the jury. It is at least inferable that he had some reason for going to the platform, which he regarded sufficient in the discharge of his duties. He was on the ground, and in the best position to judge of the necessity of going where he did at the time of the injury. It is practically conceded by appellant that he did not regard the place unsafe when he went there. Nor do we think the evidence is clear that he ought to have discovered the danger before he was struck. There is evidence that he went across to the platform in great haste, "rushed across" immediately in front of the cars as they were being pushed onto the track. Now it may well be that he was caught before he had time to know the danger, or extricate himself from it, if he did discover it, while in the perilous position.

Point is made by counsel for appellant that notice was served on deceased before the injury to the effect that there were obstructions dangerously close to the track, and that he was required to look out for them. There is no claim, however, that any notice was given deceased of the particular dangerous condition in question, and we do not think as matter of law such notice could have the effect of charging him with the assumption of risk, or of negligence in not finding it. *Leque v. Madison G. & E. Co.* (Wis.) 113 N. W. 946. We have examined the cases cited by counsel for appellant, and cannot see that they are controlling. A case more in point than any cited is *Dorsey v. Phillips & C. C. Co.*, 42 Wis. 583. There the facts were very similar to those in the case before us, and this court held that the questions of assumption of risk and contributory negligence

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were for the jury. See, also, *Sweet v. Michigan C. R. Co.*, 87 Mich. 559, 49 N. W. 882; *Hocking v. Windsor S. Co.*, 125 Wis. 575, 104 N. W. 705; *Chicago & I. R. Co. v. Russell*, 91 Ill. 298, 33 Am. Rep. 54; *Kearns v. Chicago, M. & St. P. Ry. Co.*, 66 Iowa, 599, 24 N. W. 231. After a careful examination of the evidence we are inclined to agree with the trial judge that the case was properly for the jury.

2. Error is assigned because the court refused to submit to the jury as part of the special verdict the following: "Could the deceased, by the exercise of ordinary care, have observed and discovered the platform and the track, and the precise relation of the platform to the track and the moving cars?" There was no error in this refusal, in view of the verdict submitted. The verdict returned amply included the idea covered by the question asked to be submitted. The issuable facts were covered by the verdict, and this is all that is required. We think the case was fairly tried, and no reversible error committed. Therefore the judgment should be affirmed.

The judgment is affirmed.

CHICAGO, R. I. & P. RY. CO. v. STRONG.

(Supreme Court of Illinois, June 19, 1907. Rehearing Denied Oct. 2, 1907.)

[81 N. E. Rep. 1011.]

Master and Servant—Fellow Servants—Railroads.*—The members of a train crew or switching crew are not fellow servants as a matter of law.

Same—Injuries to Servant—Questions for Jury.—In an action for the death of a member of a switching crew, the question whether a signal given by another member of the crew in response to which a train was moved was given in his capacity as vice principal or in his capacity as fellow servant held for the jury.

Appeal from Appellate Court, First District, on Appeal from Superior Court, Cook County; Joseph E. Gary, Judge.

Action by Joseph H. Strong, as administrator of the estate of John F. Chapman, against the Chicago, Rock Island & Pacific Railway Company. From a judgment of the Appellate Court,

*See foot-notes appended to *Johnson v. Boston & M. R. R.* (Vt.), 19 R. R. R. 680, 42 Am. & Eng. R. Cas., N. S., 680, where all the preceding authorities in this series on the subject are collected; *Louisville & N. R. Co. v. Vincent* (Tenn.), 22 R. R. R. 415, 45 Am. & Eng. R. Cas., N. S., 415.

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affirming a judgment in favor of plaintiff, defendant appeals. Affirmed.

Calhoun, Lyford & Sheean (W. T. Rankin and Benjamin S. Cable, of counsel), for appellant.

James C. McShane, for appellee.

SCOTT, J. On September 19, 1903, John F. Chapman, a switchman in the employ of appellant, was, while performing his duties as such switchman, caught between two cars and killed. His administrator, who is appellee in this court, brought an action of trespass on the case in the superior court of Cook county against appellant to recover damages for the death of Chapman, alleging in his declaration that death was occasioned by the negligence of a certain foreman of appellant, who was a vice principal, and not a fellow servant, of deceased. Appellant interposed the general issue. A trial before a jury resulted in a verdict for \$4,000 in favor of appellee, upon which the court rendered judgment, after overruling a motion for a new trial and a motion in arrest of judgment. The railway company appealed to the Appellate Court for the First District; and, the judgment of the superior court being there affirmed, the company prosecutes a further appeal to this court. It is contended that the superior court erred in denying appellant's motion, made at the close of all the evidence, for a directed verdict. Reversal is sought on no other ground.

Chapman, at the time of the accident, was a member of a switching crew, composed of O'Brien, foreman; Wishart and Chapman, switchmen or helpers; Wilson, engineer; and Wood, fireman. The day on which the casualty occurred was the first day Chapman had worked with this crew. It was also the first day O'Brien had acted as foreman of the crew, or of any other crew of which Wishart or Chapman were members. During the morning of the day in question this crew took 12 cars loaded with corn from one part of appellant's switchyards at South Chicago, in said county, to the elevator of the Rosenbaum Elevator Company, which was situated within the limits of appellant's yards at that place. In the afternoon of the same day the crew received orders to take 12 other loaded cars to the same elevator and to return with the 12 cars which had been taken to the elevator in the morning and which had been unloaded by employees of the elevator company during the day. The main tracks of appellant run north and south near this elevator. The elevator is east of such main tracks and is connected therewith by side tracks, which extend east from the main tracks through the elevator building. The 12 empty cars stood upon one of the elevator side tracks. Three of the cars were inside of the elevator building and stood uncoupled, with a space

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of a few feet separating each car from the next one. The remaining 9 cars stood outside and west of the elevator, and were likewise uncoupled and separated from each other. As the train approached the elevator, O'Brien, the foreman, who had general charge and control of the movements of this crew, told Chapman and Wishart that the elevator people were "in a hurry for a set," and instructed Chapman to go along the 12 empty cars as soon as they reached the elevator and open the knuckles and place the drawbars in position, and when that was done for Chapman to give him (O'Brien) a signal, and he (O'Brien) would then signal Wishart, whom O'Brien at the same time directed to stand on top of one of the loaded cars attached to the engine, and that Wishart should then signal the engineer to back the train in hard, so as "to make them all up the first shot." When the elevator was reached, the train of loaded cars was backed in upon the elevated side track; the purpose being to couple all the empty cars together and attach them to the train of loaded cars, then to move the train with the empty cars from the side track, and thereafter return the loaded cars to the same side track. Chapman, at the direction of O'Brien, made the coupling between the train of loaded cars and the most easterly of the detached empty cars. Chapman and O'Brien then proceeded east along the north side of the empty cars, opening the knuckles and placing the drawbars of those cars in position to make the couplings when they should be pushed together. O'Brien stopped before they reached the elevator building. Chapman continued his work, and passed into the elevator building alone to arrange the knuckles and drawbars of the three cars standing inside the building. The most easterly car in the building was an Illinois Central car, and the one just west of it was a Santa Fé car. These two cars were equipped with automatic couplers. The coupler on the Illinois Central car was out of order and could not be operated with the pin-lifting device, the lever of which extended to the north side of the car. This defect was latent, and the court, at appellee's request, instructed the jury to disregard the counts charging appellant with negligence in regard to that defect. Chapman, upon discovering that the coupler on the Illinois Central car was out of order, started to pass between the Illinois Central car and the Santa Fé car, which were standing about three feet apart, in order to open the knuckle on the Santa Fé car. The lever to the pin-lifting device of the latter car was on the south side thereof, and it was sufficient for the purpose of making a coupling to have the knuckle on one of the cars open. In the meantime O'Brien, without waiting for a signal from Chapman, mounted the second or third car to the west of the elevator building and signaled Wishart to back the train. Wishart repeated the signal to the engineer, the cars backed up,

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and deceased was caught between the Illinois Central car and the Santa Fé car, while passing between them for the purpose aforesaid, and thereby killed. The act of O'Brien in giving the signal to back the train is the basis of the negligence charged in the counts of the declaration upon which the case was submitted to the jury. Appellant does not deny that O'Brien was negligent in giving the signal to back the train, but contends that the giving of such signal was the act of a fellow servant of Chapman.

It is first urged by the appellant that all members of a switching crew are, as a matter of law, fellow servants. This contention is not in accordance with the law of this state. If the master has conferred upon one member of the crew authority to control and direct the movements of the other members of the crew, then, in exercising such authority, that member is not a fellow servant of the others. *Chicago & Alton Railroad Co. v. May*, 108 Ill. 288; *Illinois Southern Railway Co. v. Marshall*, 210 Ill. 562, 71 N. E. 597, 66 L. R. A. 297. The statement of the law last made is not in conflict with the authorities cited by appellant. Thus, in *Chicago & Alton Railroad Co. v. Keefe*, 47 Ill. 108, where the plaintiff was working as an employee of the railroad company on a construction train, and was injured through the negligence of the engineer in starting the engine of the train without giving the preliminary signal, and it was held that there could be no recovery because the engineer and plaintiff were fellow servants, the injury did not result from the exercise of any authority conferred upon the engineer to control or direct the movements of plaintiff or other persons working on and about the train. The same is true of the case of *Meyer v. Illinois Central Railroad Co.*, 177 Ill. 591, 52 N. E. 848, which is relied upon by appellant as controlling the case at bar. In that case it appeared that the fireman was injured by reason of the negligence of the conductor in failing to stop the train at a station, in accordance with orders received by the latter from the train dispatcher. In disposing of the case it was, among other things, said (page 596 of 177 Ill., page 849 of 52 N. E.): "The accident did not occur on account of the conductor's exercise of any authority over the appellant [the injured servant], which the appellant, by virtue of his inferior position, was bound to obey under penalty of discharge; but the accident resulting from the negligence, if any, was one that might have happened if any other person than the conductor had been intrusted with simply running the train and setting the brakes in connection with the fireman and others, without any control over the fireman." Clearly this case does not support appellant's contention that, as a matter of law, the members of a switching crew or the members of a train crew are always fellow servants.

The appellant next contends that it appears from the evidence,

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without contradiction, that the signal given by O'Brien to back the train was not the exercise of any authority conferred upon him by appellant to control and direct the movements of the other members of the crew, but was given by him in the performance of the work in which he was then engaged as a switchman with the other members of the crew, and that the particular act of negligence which caused the injury was therefore the act of O'Brien as a fellow servant. It has been frequently decided by this court that the question of the relationship existing between two servants of a common master is ordinarily a question of fact, and that it only becomes a question of law when the facts are conceded, or are beyond dispute, and when the evidence and the legitimate inferences to be drawn therefrom are such that all reasonable men will agree that the relation is that of fellow servants. *Chicago & Eastern Illinois Railroad Co. v. Driscoll*, 176 Ill. 330, 52 N. E. 921; *Norton Bros. v. Nadebok*, 190 Ill. 595, 60 N. E. 843, 54 L. R. A. 842; *Slack v. Harris*, 200 Ill. 96, 65 N. E. 669; *Illinois Southern Railway Co. v. Marshall*, 210 Ill. 562, 71 N. E. 597, 66 L. R. A. 297; *Illinois Steel Co. v. Ziemkowski*, 220 Ill. 324, 77 N. E. 190, 4 L. R. A. (N. S.) 1161. It is true that in this case there is no direct denial of certain testimony introduced by appellant to the effect that, in general, the foreman of a switching crew, in addition to acting as foreman, performs the same duties as the switchman or helpers of the crew; that in giving or repeating signals to the engineer there is no superiority of one member of the crew over another; that the foreman takes signals from and gives signals to the other men, and that it is his duty to obey the signals given to him by the other men, just as much as it is the duty of the other switchmen to obey the signals given by him; that they all co-operate together in the movement of the train; that the foreman is required by the rule and customs of the company to transmit and repeat the signals that the other members of the crew give to him; that it makes no difference as to whether the foreman or one of the helpers originates a signal to move an engine; that neither has more power in that respect than the other; that it is the duty of the engineer to move the engine according to the signals received, whether such signals come from the foreman or from one of the switchmen. On the other hand, however, Charles H. Motsett, appellant's general yardmaster, called as a witness by appellant, testified: "The duties of the foreman are a good deal the same as the duties of a conductor on the road. He is the captain of a crew. * * * He is over the engineer in the operation of the train. * * * When he goes to an independent house, like an elevator, he will go in there and inquire how many cars they have for his line. Then he goes out and orders the movements of the crew to accomplish that work. He is in all respects, so far as the train and switching is con-

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cerned, in command, like a captain. They all obey his orders to that extent. * * * He earns more money than the other members of the crew. * * * All the orders given to that crew are given to him, and he gives them to the crew. * * * After backing into the elevator, if a foreman comes back, he orders the engine to back in there, to couple on the cars, and, when everything is all right, as he thinks, he orders them to go ahead, with a signal. * * * He is the man who decides what shall be done and what shall not be done, and no man in his crew has a right to order him. He is not required to obey any man in his crew, but a man in his crew is required to obey him."

We would have no hesitation in declaring that O'Brien was a fellow servant of the other members of the crew when he was engaged in performing the manual work of coupling or uncoupling cars, in setting or releasing the brakes of the cars, in giving signals to the engineer or other members of the crew when he desired to inform them that he had completed some manual work in and about the switching, or in transmitting signals from one member of the crew to another. All of those duties rested upon Chapman and Wishart, and when performed by O'Brien were done in the same capacity as when performed by either of the other two men. The signal complained of in this case, however, was not such a signal as either Chapman or Wishart would have been authorized to give. Under like circumstances, neither of those men would have had any authority or right to signal the engineer to back the train without having first received a signal from the person adjusting the couplers, indicating that the same were adjusted and that such person was out of danger. O'Brien, acting as a fellow switchman, would have had no more authority in that regard than either of the other men. O'Brien, however, was acting in a dual capacity. Some of his acts were done as vice principal; others, as a fellow servant of the other members of the crew. As fellow servant he had no authority to give the signal which he did give; as vice principal, having complete control over the members of the crew and the movements of the train, as the evidence tends to show, he had authority to order the engineer to back the train without waiting for a signal from Chapman. While as a fellow servant, at the time in question, he would only have had authority to transmit to Wishart a signal to back the train when he received such a signal from Chapman (and his negligence in transmitting such signals would then be that of a fellow servant), as foreman he possessed authority to originate signals or orders concerning the movements of the train, without regard to whether he had received any signal from another member of the crew. The accident did not result from any negligent signal given by the foreman upon performance of a task by him which might have been performed by another member of the crew, and the completion of which would have

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properly led the person performing the task to give a signal for moving the engine. Under these circumstances we cannot hold that all reasonable men will agree that O'Brien was acting in the capacity of a fellow servant of Chapman when he gave the signal to back the train. In our judgment the question whether that particular signal was given in his capacity as vice principal or in his capacity as fellow servant was a question of fact for the jury. *Chicago & Eastern Illinois Railroad Co. v. Driscoll*, 207 Ill. 9, 69 N. E. 620.

No other reason is presented by appellant in support of its contention that the trial court erred in refusing to direct a verdict in its favor.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

NELSON v. ATLANTIC COAST LINE R. CO. RELIEF DEPARTMENT.

(Supreme Court of North Carolina, March 11, 1908.)

[60 S. E. Rep. 724.]

Parties—Capacity to Be Sued.—Where a policy was issued by a certain railroad company "Relief Department," and such relief department was not incorporated and had no legal entity, an action for breach thereof must be either against the person making the contract or the railroad company, and cannot be maintained against such department.

Appeal—Dismissal of Action Ex Mero Motu.—Under rule 27 (53 S. E. viii), which provides for dismissal ex mero motu where there is a defect of jurisdiction, a case will be dismissed where the defendant named is not a natural person nor a corporate body, and has no legal entity.

Appeal from Superior Court, Pitt County; Lyon, Judge.

Action by W. C. Nelson against the Atlantic Coast Line Railroad Company, Relief Department. From the judgment rendered, both sides appeal. Dismissed.

J. L. Fleming, for plaintiff.

Skinner & Whedbee, for defendant.

CLARK, C. J. The defendant named in the summons is "the Atlantic Coast Line Railroad Co. Relief Department." The process is returned as served on "Dr. G. G. Thomas, Superintendent of the Atlantic Coast Line Relief Department." The complaint alleges a contract with said "relief department" and a breach thereof. The action is not against the railroad company, nor

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has the summons been served on that company, nor has it appeared in this action.

It is admitted here by counsel of both parties that said "A. C. L. Relief Department" has not been incorporated. It is neither a natural nor an artificial being. It appears fully in the documentary evidence filed as exhibits in the pleadings, i. e., the alleged contract of insurance and the rules of said "relief department" that it is neither incorporated, nor is it a separate entity, but that it is in fact a bureau or department of the Atlantic Coast Line Railroad Company. If the contract is valid, the liability is that of said railroad company, and the summons must be served on an officer of that company. Even if the relief department could be treated as a natural person, acting as an agency for the railroad company, the agency was fully disclosed at the time of the alleged contract, and the action should be brought against the principal, the railroad company. Even a state department, like the insane asylum (*Bain v. State*, 86 N. C. 49); or the board of education (*Co. Board v. State Board*, 106 N. C. 81, 10 S. E. 1002); or the state prison (*Moody v. State's Prison*, 128 N. C. 13, 38 S. E. 131, 53 L. R. A. 855)—is so essentially a part of the state, notwithstanding these departments are created by statute, that they have no power to sue and have immunity from liability to suit, except when the statute creating them expressly grants permission that they may "sue and be sued." For a stronger reason, this "relief department," which is not created a corporation under any general or special legislative authority, is a mere "agency" of the Atlantic Coast Line Railroad Company, and no liability can be adjudged upon any alleged contract except by action against the natural person making the contract, or against the railroad company, as the principal of which the "relief department" was a mere agency. The "relief department" is not a natural person. It is not a corporate body. It has no legal entity. It is, in the eye of the law, an "airy nothing." It has no power to contract. Any contract made in its name would be the contract of the individual assuming to act for it, or the contract of the railroad company whose "agency" it was. A judgment against the "relief department" would have nothing to act on. The sheriff could find no one upon whom to levy his execution. It would glide from his grasp as the shade of Creusa eluding the embrace of Æneas.

"Tenuisque recessit in auras.

*Ter frustra compressa manus effugit imago
Par levibus ventis volucrique simillima somno."*

II Virg. Æn. v. 791 et seq.

Under rule 27 (53 S. E. viii) of this court, if there is a defect of jurisdiction, the court should dismiss the action *ex mero motu*. Here there is such defect, both because it appears that the al-

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leged contractor had no legal power to make a contract, and because no defendant has been brought into court. Certainly the position of plaintiff is no better than if the summons had been served on an infant in an action on a contract, and the motion which was made at the close of the evidence for nonsuit should have been granted.

It is true, as in *Stanly v. Railroad*, 89 N. C. 331, that where in an action against a corporation there is an omission to allege the incorporation, this is immaterial if it is in fact a corporation, and if an issue on that point is desired it should be raised by a denial in the answer. But here it is both admitted and appears that there is no corporation. In *State v. Shaw*, 92 N. C. 768, it was held that on an indictment for forgery where an intent to defraud a corporation was charged, the indictment need not charge the incorporation, and the same was held in *State v. Grant*, 104 N. C. 910, 10 S. E. 554, where the ownership of goods alleged to have been stolen was laid in a corporation. The reason given was that the fact of incorporation was "not a material part of the offense charged, and is only required to identify the transaction," and hence it was necessary neither to charge nor to prove incorporation, it being sufficient to show that by reputation such was the name of the owner of the stolen goods or of the body intended to be defrauded by the forgery. There are also cases where persons dealing as a firm are estopped to deny the partnership.

But here it is essential to an action on the alleged policy of insurance that there should be a natural or corporate body as contractor, and that there should be a potential actually existent defendant brought into court. If, as already said, the contractor pretended to be a corporation untruly, the action should be against the individuals or the principal. While it is not essential to allege incorporation if there is in fact a corporation, here it appears affirmatively by the admission of both counsel, by the exhibits in the pleadings, and by the evidence, that there is no such legal entity as that named as defendant in the summons and in the complaint. The court will not pass upon the validity of the contract nor its construction when it appears that there is no defendant before it. In both appeals action dismissed.

CHESAPEAKE BEACH RY. CO. *v.* DONAHUE.

(Court of Appeals of Maryland, Jan. 7, 1908.)

[68 Atl. Rep. 507.]

Appeal—Questions Reviewable—Record.—Where no bill of exceptions founded on remarks of the trial judge appears in the record, on appeal, the propriety of the remarks is not presented for consideration.

Railroads—Injury to Person on Track—Contributory Negligence.*—Where one, for his own convenience, walks on the main track of a railroad, when he knows that a train is about due, without first ascertaining whether the train has in fact passed by, and fails to look and listen for an approaching train, his conduct constitutes negligence per se.

Same.—Where a trespasser on a railroad track is struck by a train while walking on the track near a station, he cannot invoke in extenuation of his negligence the failure of the railroad company to comply with Code Pub. Gen. Laws, art. 23, § 266, requiring trains to stop for a half minute at stations for the purpose of taking on passengers.

Same—Discovery of Peril—Sufficiency of Evidence.—In an action against a railroad for injuries to plaintiff through being struck by a train while walking along the track, evidence held insufficient to show that those in charge of the train became aware of plaintiff's peril in time to have avoided the accident by the exercise of reasonable care.

Same—Use of Track as Footpath—Acquiescence of Railroad.†—The mere passive acquiescence by a railroad company in the occasional use of its track as a footpath did not create a new duty or impose additional obligation on its part to provide against the danger of accident to trespassers walking along on the track.

Witnesses—Impeachment.—Where, in an action against a railroad for injuries to plaintiff while walking on the track, defendant's engineer and firemen denied that they had any knowledge of plaintiff's presence on the track until after the accident, it was proper for plaintiff to ask the fireman, for the purpose of contradicting him, whether he had not stated that on the night of the accident the engineer was drunk, and that he (witness) had shouted to plaintiff before the engine struck him, and to prove by a witness that the fireman so stated,

*See foot-note appended to *Gulf, etc., Ry. Co. v. Matthews* (Tex.), 20 R. R. R. 573, 43 Am. & Eng. R. Cas., N. S., 573.

†See extensive note, 21 R. R. R. 218, 41 Am. & Eng. R. Cas., N. S., 218; foot-notes appended to *Louisville & N. R. Co. v. Farris* (Ky.), 25 R. R. R. 347, 48 Am. & Eng. R. Cas., N. S., 347; foot-notes appended to *Railroad Co. v. Village of Roseville* (Ohio), 25 R. R. R. 173, 48 Am. & Eng. R. Cas., N. S., 173; foot-notes appended to *Teakle v. San Pedro, etc., R. Co.* (Utah), 25 R. R. R. 18, 48 Am. & Eng. R. Cas., N. S., 18.

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though such evidence could not be considered by the jury as proving the truth of the statement.

Same—Evidence.—In an action against a railroad for injuries to plaintiff while walking on the track, testimony of plaintiff that some one in the engine cab shouted to him when the engine was on top of him to get out of the way did not tend to prove that he was seen from the engine in time for its crew in the exercise of reasonable care to have prevented the injury, but rather tended to prove that he was seen too late for that purpose.

Appeal from Circuit Court, Prince George's County; Geo. C. Merrick, Judge.

Action by Thomas Donahue against the Chesapeake Beach Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before BOYD, C. J., and BRISCOE, PEARCE, SCHMUCKER, BURKE, WORTHINGTON, and THOMAS, JJ.

William Hitz and F. D. McKenney, for appellant.

R. H. McNeill, for appellee.

SCHMUCKER, J. The appellee, Thomas Donahue, while walking along the railroad track of the appellant company in Prince George's county, was struck and injured by one of its trains. He sued the company in the circuit court of that county for damages resulting from his injury, and recovered the judgment, from which the present appeal was taken.

The record contains 11 bills of exceptions, of which 8 relate to rulings on the admissibility of evidence, 2 to the court's action on the prayers, and 1 to its refusal to grant a motion in the nature of a prayer asking the case be taken from the jury for want of legally sufficient evidence to justify a verdict for the plaintiff. The record in the case is unduly voluminous, containing not only all of the testimony taken in the case, instead of so much only of it as is necessary to explain the bearings of the rulings upon the issues and questions involved, but also a full report of an almost continuous colloquy which ensued between the opposing counsel or between them and the trial judge during the week or more consumed in the trial below. It is stated in the appellant's brief that exception was taken by the defendant to some of the remarks made by the trial judge to the jury when the case was given to them; but as no bill of exceptions founded thereon appears in the record, the question of the propriety of the remarks is not presented for our consideration. It appears from the evidence that the appellant company owns and operates a steam railroad, extending from the District of Columbia through Prince George's and Calvert counties to Chesapeake Beach. The operating yards of the road extend from the dis-

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trict line about three-quarters of a mile to a point in Prince George's County known as "Seat Pleasant," Where a roundhouse, water tank, and other operating structures are located. The appellee Donahue is a truck farmer, about 30 years old, who has resided all of his life in the vicinity of Seat Pleasant, and was quite familiar with the locus in quo of the accident at the time of its occurrence. On November 22, 1905, after spending the day in Washington, he started at about 6 o'clock in the evening to walk on the main track of the defendant's railroad from the district line to his home. The night was a dark one, with no moon shining. When he had reached a point nearly abreast of the roundhouse, a regular daily passenger train coming from Washington about 15 minutes behind its schedule time, at a speed of from 20 to 25 miles an hour, overtook him from behind, and struck him, and cut off one of his feet. The accident occurred on a slight curve in the track, but beyond the curve looking toward Washington the track ran almost in a straight line for 500 yards. A number of empty passenger cars were standing on a side track near the roundhouse, but not in such a position as to intercept the view of the place of the accident to one coming down the track from Washington. There is evidence in the record tending to show that many persons had been in the habit of walking from the district line to their homes over this part of the railroad track ever since its construction in 1899, and that, although there was no depot building or platform there, Seat Pleasant appeared among the names of the stations upon the time-tables of the appellant, and its passenger trains occasionally stopped there to take on or let off passengers, and that the trains were accustomed to ring a bell and blow a whistle as they approached the place. There is also evidence tending to show that pedestrians were in the habit of crossing the railroad tracks at a place quite near the locality of the accident, and that there was a board there across the ditch running along the side of the track. There is also evidence tending to show that Donahue had been seen very many times on the company's tracks by its superintendent, and had been warned by him on different occasions to keep off of them. The plaintiff put in evidence at the trial section 266 of article 23 of the Code of Public General Laws, which requires all railway trains to entirely stop for one-half a minute at each station advertised by the railroad company as one for receiving passengers upon such train, and imposes a penalty for a failure to comply with its provisions.

Donahue, as a witness on his own behalf, gave the following account of the accident: "The train struck me just as I was coming to the board. There was a board on the side where the people walk. They get off, and they start to walk up on the side of the track next to Mr. Lacey's place. Before I got to this

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board, the engine struck me. I heard the rattle of it behind me, about four or five yards behind me, and I saw the light flash in front of me. Some one in the cab of the engine—I judge it was in the cab of the engine—hollered to me when the engine was on top of me to get out of the way. At that time I jumped across the track as quick as I could, and I hung my foot, and the engine went over it.” In the following extract from his cross-examination he gives further details of the occurrence: “Q. Mr. Donahue, you say that somebody called to you from this cab? A. Yes, sir. Q. When? A. It was from the cab. The sound came from the cab. Q. Where were you then? A. Where were I? Q. Yes. A. On the track going home, near the place where I was struck. Q. When did you first hear the train? A. When it was about four or five yards from me, I saw the light flash in front of me, and heard the rattle behind me. In the meantime some one hollered to me from the cab of the engine. Q. Was the first intimation you had that this train was there gotten from this call to you? Was that the first you knew of it? A. Yes, sir. When I heard the rattle of it behind me, and saw the lights flash in front of me, at that time I jumped off the track as quick as I could, and some one in the cab of the engine hollered to me to get out of the way. Q. Where were you when you first heard the rattle? A. Right near the place where I was struck. Q. How near? A. I couldn't give the whole space. When I heard the rattle of it, I got off as quick as I could. It was right at the place, I might say. Q. How long was it after you heard the rattle before you heard this call? A. Right at the same time. At the time I threw myself off the track, I heard some one up in the cab of the engine—I judge it was the cab of the engine, the sound came from there—to get out of the way. Q. You say you can stay at your house and hear the whistle blow at Marlboro? A. I judge it was at Marlboro from the time it runs to my house. Q. Can you stay at your house and hear the engine puff at the district line? A. Yes, sir; I judge about that. Sometimes it starts out with a puff.” Donahue also testified that, when the accident happened, he was not intoxicated, but had full possession of his senses, and would have gotten off the track if he had heard the train in time. He further stated in his testimony that no whistle was blown nor bell rung from the engine before it struck him. Several other witnesses who were near the scene of the accident testified that they heard neither bell nor whistle from the approaching train, although they felt sure they would have heard them if they had been sounded. On the contrary, the engineer and fireman of the train both testified that the bell was rung and the whistle blown in the usual manner on approaching Seat Pleasant on that evening. Love Williams and Garner Randall, two acquaintances of Don-

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ahue, who also resided near Seat Pleasant, testified for the plaintiff that they were walking home together from the district line on the railroad track about 75 yards behind him on the evening of the accident. They both heard the train running and puffing behind them, and one of them heard the engine bell ringing, and they stepped from the track and allowed it to pass them. They heard Donahue's cries when he was injured, and hastened to his relief. Randall said that Donahue, when they came up to him, did not talk like a drunken man. Williams said that Donahue had been drinking, but he could not "tell just whether he was sober or not." He had sense enough to tell Williams what to do. Witness further said that when he came up to Donahue, there was a bottle of whisky "setting there," and he asked Donahue what he was doing with a bottle there, and Donahue replied: "Love, take it away and drink it, or break it to pieces, or do what you chose with it. I don't want it any more as long as I live." Donahue himself testified that he had not taken more than two drinks, one of whisky and one of beer, during the day, and further said that the bottle of whisky which he gave to Love Williams after the accident had not been opened, but each one of the three other witnesses testified to having seen Donahue drunk in Washington between 4 and 5 o'clock on the afternoon of the day on which he was injured.

It is apparent from the testimony to which we have adverted, coming from the plaintiff's own witnesses, that on the night on which he was injured he deliberately started to walk for the distance of nearly a mile on the main track of the railroad at a time when he must from his familiarity with the situation have known that a train was about due without first ascertaining whether the train had in fact passed by. He continued to walk upon the track until he had almost completed his intended journey, without, so far as the record shows, observing any precautions to protect himself from approaching trains, although an occasional turning round and looking and listening would have revealed to him the sound of the coming train or the glare of its headlight in time to save himself from harm. Furthermore, he thus went and remained upon the track, whose rails were a constant signal of danger to him, for his own convenience, and not for the purpose of any business with the railroad company. Under the well-settled law of this state, such conduct constitutes negligence per se, and, if a person while so acting is injured by a passing train, he will be presumed to have contributed to the occurrence of the accident, and, unless that presumption be overcome, he cannot recover for the injury. This is especially true where the injured party is, as in the present case, a deliberate trespasser upon the railroad tracks when injured.

In *State, Use of Bacon, v. Balto. & Pot. R. R. Co.*, 58 Md. 482, the suit was instituted to recover damages for the killing

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By a railroad train of a man who was walking upon the track at night. In that case, as in the one before us, the man had lived for several years near the track, and was familiar with the running of the trains, and the train which killed him was a regular passenger train, running a little late. In the opinion in that case this court, speaking through the late Chief Judge Alvey, said: "Repeating here substantially what has been said and held in previous cases, the deceased was at the time of the accident on the private right of way of the defendant, where he had no right to be. But, aside from this fact, the failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking proper precautions for his own safety. Negligence of the defendant's employees in these particulars was no excuse for negligence on his part. He was bound to listen and to look while walking along the railroad track, in order to avoid an approaching train, and not to walk carelessly into a place of possible danger. Had he used his senses, he could not have failed both to hear and to see the train which was approaching; and, having failed to observe the proper precautions, there is no right of action against the defendant for the consequences of the accident. *N. C. R. Co. v. Burns*, 54 Md. 113; *B. & P. R. Co. v. Stansbury*, 54 Md. 648; *Railroad Co. v. Houston*, 95 U. S. 702, 24 L. Ed. 542." Again, in *Westn. Md. R. Co. v. State*, Use of Kehoe, 83 Md. 434, 35 Atl. 90, where the plaintiff, who had been drinking freely, attempted to cross the railroad tracks at night, near to but not upon a public crossing and was run over by a moving car and had one of his legs cut off, this court in reversing the judgment of the lower court said, speaking through the late Chief Judge McSherry: "As no one has a right to be negligently or wrongfully on a railroad track, the company owes no duty to a person so situated to anticipate that he will be in such a position; but, if its servants see him in a place of peril, though he be wrongfully or negligently there, then the duty arises to avoid injuring him, if possible. The duty which the company owes to such person originates only when the perilous position is seen or known by the company's servants. When, therefore, a plaintiff is wrongfully or negligently on the tracks of a railroad in a position of peril, as the prayer we are considering assumes was the fact in the case at bar, the duty of the company to use due care to avoid injuring him arises at the moment the servants of the company see and become aware of his peril, and hence, to sustain this branch of the prayer, it was essential for him to show, first, that the company's servants had knowledge of his peril; secondly, that they had that knowledge in time to arrest an injury; and, third, that they failed to exert proper care to avoid the injury after acquiring knowledge of the peril. Until

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the employees are made aware of the peril arising from an act of negligence on the part of the plaintiff, they are under no obligation to assume that he will be negligent or will be in a dangerous place which he has no right to occupy; and consequently they owe him no duty to anticipate that he will be where he ought not to be, or to guard in advance against the possible or even probable results of his unknown wrongful occupancy of the tracks; and, as they owe him no such duty, their failure to perform it is not an act of negligence on the part of the company." And in the more recent case of *Barvick v. United Railways Co.*, 101 Md. 246, 61 Atl. 138, we said: "It is settled, in this state at least, and generally, that, where a party is discovered on a track of a railroad in the full power of locomotion and no impediment to his escape, those on the train may well act on the assumption that he will use his senses for his protection and get out of the way of danger before he is struck. *B. & O. R. R. Co. v. State*, 69 Md. 558, 16 Atl. 212; *B. & O. R. R. Co. v. State*, 71 Md. 595, 18 Atl. 969; *Enger v. United Rys.*, 98 Md. 400, 56 Atl. 789."

The appellee would not have been relieved from the results of his own negligence if the jury had found from the evidence that there was a public crossing and a railway station within a few yards of the place where he was injured; for, even if he had a right to be upon the tracks in the act of crossing the railway or going to its station, he had no right to use them for the totally different purpose of walking along them with no intention of embarking on a train as he was doing when he was injured. For the same reason, he is not entitled to invoke in extenuation of his own negligence the failure of the company, if such there were, to comply with the provisions of section 266 of article 23 of the Code, relating to the stoppage of railway trains at stations for the purpose of taking on passengers. The record does not furnish any legally sufficient evidence from which the jury could have found that those in charge of the train or its engine were made aware of the peril of the plaintiff in time to have saved him from injury by the exercise of reasonable care. It results from what we said in *Garvick's Case*, *supra*, that if he had been discovered on the track in the full power of locomotion, and no impediment to his escape, those on the train might well have acted on the assumption that he would use his senses for his own protection, and get out of the way in time to save himself from harm. Nor did the mere passive acquiescence, if such there were, of the appellant in the occasional use of its track as a foot-path by persons returning from the district line to their homes in Prince George's county, create a new duty, or impose additional obligations on its part to provide against the danger of accident. *Railroad Co. v. Godfrey*, 71 Ill. 500, 22 Am. Rep. 112, and cases there cited.

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Both the engineer and fireman in charge of the engine positively denied that they had any knowledge of his presence on the track until they learned of the accident after its occurrence. The plaintiff's counsel at the trial of the case were permitted to ask the fireman, for the purpose of contradicting him and discrediting his testimony, whether he had not, six months or more after the date of the accident, told two persons that on the night of the accident the engineer was drunk, and that he, the witness, was the man that hollered to the plaintiff that night. The fireman positively denied that he had made any such statements. One of the parties to whom the statement was alleged to have been made was afterwards put upon the stand, and testified that the fireman had, in fact, made the statement to him. The plaintiffs' counsel were entitled to put the question to the fireman when he was on the stand for the purpose of contradicting him, and to introduce the contradicting testimony, and the jury were entitled to consider that testimony in determining the degree of credit to be accorded the fireman's evidence; but they were not entitled to consider it as evidence to prove the truth of the contents of the statement. Such evidence "is to be received and considered by the jury alone as rebutting and contradicting evidence to discredit the witness." "Were it otherwise, the result would be the admissibility in an indirect way of often the loosest and most unreliable hearsay." *Mason v. Poulson*, 43 Md. 176; *Stirling v. Stirling*, 64 Md. 148, 21 Atl. 273. The plaintiff's own testimony that some one in the cab "hollered" to him when the engine was on top of him to get out of the way does not tend to prove that he was seen from the engine in time for its crew in the exercise of reasonable care to have prevented his injury; but rather tends to prove that he was seen too late for that purpose.

For the reasons which we have mentioned, we are of the opinion that the learned judge below should have granted the defendant's first prayer, which asserted that there was no evidence in the case legally sufficient to entitle the plaintiff to recover, and that the verdict of the jury should be for the defendant; and for his error in rejecting that prayer the judgment appealed from must be reversed. As we have determined that the plaintiff was not entitled to recover and will therefore not remand the case, we deem it unnecessary to review the court's action upon the other prayers, or upon the other exceptions taken by the defendant to the rulings upon the admissibility of evidence.

Judgment reversed, with costs, without awarding a new trial.

SOUTHERN RY. CO. *v.* DICKENS.

(Supreme Court of Alabama, Dec. 19, 1907.)

[45 So. Rep. 215.]

Pleading—Hearing on Demurrer.—Where an answer alleges that plaintiff's negligence proximately contributed to his damages, but the facts relied on as constituting negligence are set out, the sufficiency of the facts to show contributory negligence is, on demurrer, a question of law.

Railroads—Injuries to Animals—Contributory Negligence—Fences.*—Failure to properly maintain fences along a defendant railway company's right of way in accordance with a contract is not such contributory negligence as will preclude recovery for injuries to animals that have strayed upon the track, since the default was not the proximate cause of the accident.

Pleading—Amendment—New Cause of Action.—Where a complaint alleged the crippling of a cow so as to diminish her value, an amendment alleging that the cow died from the injuries and striking out the allegation as to diminution in value does not state a different cause of action.

Appeal from Circuit Court, Mobile County; Samuel B. Browne, Judge.

Action by Charles C. Dickens against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The first count alleged the negligent killing of a heifer. The second count originally alleged the crippling of a cow so as to diminish her value. This count was amended so as to show that from the injuries received by being run over the cow died, and eliminating the diminution in value by striking out the allegation. Motion was made to strike the second count of the complaint, because it was filed without leave of court, and because it constituted a departure from the original action.

Special pleas 2 and 3, filed by the defendant, were as follows:“(2) Comes the defendant in the above-entitled cause, and for answer to the second count of the complaint says that plaintiff was guilty of contributory negligence which proximately con-

*For the authorities in this series on the subject of contributory negligence where animals are struck by trains, see foot-notes appended to *O'Leary v. Chicago, etc., Ry. Co.* (Iowa), 16 R. R. R. 141, 39 Am. & Eng. R. Cas., N. S., 141, where all those preceding it are collected; *Norfolk & W. Ry. Co. v. Smith* (Md.), 25 R. R. R. 696, 48 Am. & Eng. R. Cas., N. S., 696; foot-notes appended to *Sarja v. Great N. Ry. Co.* (Minn.), 21 R. R. R. 615, 44 Am. & Eng. R. Cas., N. S., 615.

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tributed to his damage, in this: That plaintiff on November 15, 1893, entered into a written agreement with the Mobile & Birmingham Railway Company by the terms of which said plaintiff agreed and promised for a consideration to maintain at his own cost and expense fences on each side of the track of said Mobile & Birmingham Railway Company passing through plaintiff's land, lying between Chickasabogue Creek and Bayou Sara; and defendant avers that it has succeeded and become invested with all the franchises, rights, and properties of said Mobile & Birmingham Railway Company, and that said agreement is in force and effect between plaintiff and defendant. And defendant avers that, notwithstanding the duties imposed by agreement on said plaintiff to keep and maintain said fences on each side of defendant's track through plaintiff's land as aforesaid, plaintiff carelessly and negligently, and contrary to his plain duties in the premises, allowed said fences to be and become in an unsafe and insecure condition, and in some places broken down; and defendant says that, owing to said negligence and careless failure on part of the plaintiff to perform the duty thus imposed on him, said animal, the killing of which is here complained of, got upon defendant's right of way through said insecure fence and was in consequence thereof killed. And defendant avers that said animal got upon its right of way and was killed at or near Cleveland Station, at a place where plaintiff had agreed to maintain said fences. Wherefore defendant says that plaintiff himself, and not defendant, is liable for the killing of such said animal, and the damage complained of." The third plea sets up the contract itself, which is in effect as stated in the second plea. The allegations of negligence are the same as in the second plea.

Demurrers were interposed to the second and third pleas as follows: "Said pleas show that the injury complained of was not the proximate result of the alleged contributory negligence. (2) There is no causal connection between the alleged contributory negligence and the injury complained of." These demurrers were sustained, and there was jury and verdict for the plaintiff, and judgment thereon for \$35.

Bestor, Bestor & Young, for appellant.

Francis J. Inge, for appellee.

DENSON, J. This is a suit by Charles C. Dickens against the Southern Railway Company to recover damages for the alleged negligent killing of a cow, the property of the plaintiff. There were verdict and judgment for the plaintiff, and from the judgment the defendant appeals.

In addition to the plea of the general issue, the defendant filed special pleas 2 and 3, which in effect set up as a defense to the action that the plaintiff was bound by a written contract with

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defendant, made on a valuable consideration, to maintain at his own cost and expense fencing on each side of the defendant's road where it passed through plaintiff's lands, and that he carelessly and negligently, and contrary to his duty under the contract, allowed the fences to be and become in an unsafe and insecure condition, and in some places broken down, in consequence of which the animal for the killing of which the suit is brought got upon defendant's right of way and was killed. This failure to keep up the fences, it is averred, proximately contributed to plaintiff's damages. The court sustained a demurrer to this plea, on the grounds that the plea fails to show that the injury complained of was the proximate result of the alleged contributory negligence, and that no causal connection between the alleged contributory negligence and the injury complained of is shown. It has been held in some jurisdictions, notably in Ohio (*Cincinnati, H. & D. R. Co. v. Waterson*, 4 Ohio St. 425; *Pittsburg, C. & St. L. Ry. Co. v. Smith*, 26 Ohio St. 124), that where a plaintiff is under contract with a railroad company to build and maintain fences between his lands and a railroad right of way, and in consequence of his failure to build or maintain such fences his stock wander on the railroad and are killed by its engine, the road cannot be made liable, except upon proof of wantonness or of intentional wrong. The same doctrine is held in Indiana (*Bond v. Evansville, etc., R. R. Co.*, 100 Ind. 301); but in the latter state there is a statute which requires railroads to be fenced. Each of these cases proceeds on the theory that the stock were trespassing on defendant's road at the time of the injury.

The precise question presented has not been determined by our court; but in cases involving the killing of animals in districts wherein stock were by statute prohibited from running at large we have uniformly held that the unlawful act of the owner in suffering them to run at large is no defense to an action for the negligent killing of such animals. This ruling is based on the theory that, "to deprive a party of redress because of his own illegal conduct, the illegality must have contributed to the injury." Alabama, etc., *R. R. Co. v. McAlpine & Co.*, 71 Ala. 545; *Southern Railway Co. v. Hoge*, 141 Ala. 351, 37 South. 439; *Ensley Mer. Co. v. Otwell*, 142 Ala. 575, 38 South. 839; Alabama, etc., *R. R. Co. v. Powers*, 73 Ala. 244. While the plea avers that the negligence or unlawful act complained of proximately contributed to plaintiff's damages, yet the facts which are relied on as constituting the negligence or unlawful act are set out in the plea; and on the demurrer it became a question of law for the court as to the sufficiency of such facts to show contributory negligence. The plea under consideration does not deny that defendant was negligent; and we can see no difference in principle between holding that the unlawful act of failing to

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keep the fences up cannot be urged as constituting contributory negligence and holding that the unlawful act of suffering animals to run at large does not constitute such negligence. The act of the plaintiff in failing to maintain the fences may constitute a breach of the contract; and, although the cow escaped from the plaintiff's land on account of the breach, it cannot be held to have been the moving proximate cause of the death of the animal, and the court did not err in sustaining the demurrer to pleas 2 and 3. *Mobile & Ohio R. R. Co. v. Christian*, 146 Ala. 404, 41 South. 17, and cases there cited; *St. Louis, etc., R. R. Co. v. Douglas* (Ala.) 44 South. 677; authorities cited, *supra*.

The insistence that the amendment of the complaint, by averring that the cow was killed, constituted a departure, is untenable. *St. Louis, etc., R. R. Co. v. Douglas*, *supra*.

We have considered all of the grounds of error insisted upon, and, having found no error, the judgment of the circuit court is affirmed.

Affirmed.

TYSON, C. J., and ANDERSON and McCLELLAN, JJ., concur.

HOLLINS et ux. v. NEW ORLEANS & N. W. R. Co.

(Supreme Court of Louisiana, March 4, 1907. On Rehearing, June 10, 1907.)

[44 So. Rep. 159.]

Railroads—Injury to Child on Track—Negligence.*—It is the grossest negligence for a railway company to back a train through the streets of a town, particularly through a part where children congregate, without having some one to keep a lookout from the forward end; and, where, under such circumstances, and in broad daylight, a child of tender years is found, by a person passing by, to have been run over and killed, and it appears that no one connected with the train was aware of the killing, it is for those who are responsible for such negligence to show that the tragedy, which would otherwise appear to have been its natural consequence, was, in fact, attributable to some other and excusing cause.

Same—Companies Liable for Injuries.—Where the evidence in a case is of such a character as to satisfy a reasonable mind that one

*For the authorities in this series on the subject of the care required in running ordinary steam railroad trains in streets, see foot-notes appended to *Eichorn v. New Orleans, etc., Co.* (La.), 13 R. R. 128, 36 Am. & Eng. R. Cas., N. S., 128, where all the preceding ones are collected or referred to; foot-notes appended to *Haley v. Missouri Pac. Ry. Co.* (Mo.), 25 R. R. 683, 48 Am. & Eng. R. Cas., N. S., 683; *Johnson v. Louisville & N. R. Co.* (Ky.), 22 R. R. 658, 45 Am. & Eng. R. Cas., N. S., 658; *McCabe's Adm'x v. Maysville, etc., R. Co.* (Ky.), 21 R. R. 852, 44 Am. & Eng. R. Cas., N. S., 852.

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railroad company to all intents and purposes, owns and operates another, though the autonomy of the latter is preserved for the convenience of the parties, the two companies may be condemned, in solido, for a tort committed in the course of such operation. If the prima facie case, made out by such evidence, is not the real case, it is for the companies to show it. The knowledge of their relations is in their possession, and not, ordinarily, in the possession of the person injured.

On Rehearing.

Same.†—As a general proposition, where one railroad company negligently causes an injury while operating the railroad of another, both companies are liable. Hence a petition which sets forth such a condition of facts shows a cause of action against both companies.

(Syllabus by the Court.)

Appeal from Tenth Judicial District Court, Parish of Concordia; John Stirling Boatner, Judge.

†For the authorities in this series on the question whether the lessee of a railroad is liable for its own negligence, see foot-notes appended to *Hawkins v. Central of Georgia Ry. Co.* (Ga.), 11 R. R. R. 831, 34 Am. & Eng. R. Cas., N. S., 831, where all the preceding ones are collected or referred to; *Shores v. Southern Ry. Co.* (S. Car.), 20 R. R. R. 88, 43 Am. & Eng. R. Cas., N. S., 88.

For the authorities in this series on the question whether a railroad company is liable for the torts of another company committed while using its railroad, see foot-notes appended to *St. Louis, etc., Ry. Co. v. Chappell & Billingsley* (Ark.), 24 R. R. R. 789, 47 Am. & Eng. R. Cas., N. S., 789; foot-notes appended to *Travis v. Kansas City, etc., Ry. Co.* (La.), 24 R. R. R. 694, 47 Am. & Eng. R. Cas., N. S., 694.

For the authorities in this series on the subject of the joinder of tort-feasors as defendants, see foot-notes appended to *Eastin & Knox v. Texas & P. Ry. Co.* (Tex.), 24 R. R. R. 508, 47 Am. & Eng. R. Cas., N. S., 508; foot-notes appended to *Southern Ry. Co. v. Grizzle* (Ga.), 20 R. R. R. 451, 43 Am. & Eng. R. Cas., N. S., 451 (joinder of master and servant in action for tort of servant); *Couch v. Texas & P. Ry. Co.* (Tex.), 22 R. R. R. 406, 45 Am. & Eng. R. Cas., N. S., 406 (joinder of railroad and city in action for tort of latter committed in exercising privilege conferred on it by railroad, of taking water from wells on land of private person); *Ft. Smith Sub. Ry. Co. v. Maledon* (Ark.), 21 R. R. R. 119, 44 Am. & Eng. R. Cas., N. S., 119 (joinder of landowner and railroad company, in action by tenant for destruction of crops on land conveyed for company's right of way); *Gossett v. Southern Ry. Co.* (Tenn.), 18 R. R. R. 706, 41 Am. & Eng. R. Cas., N. S., 706 (joint liability of railroad and contractors for injuries to property from blasting operations); *Boston & M. R. R. v. Sargent* (N. H.), 12 R. R. R. 459, 35 Am. & Eng. R. Cas., N. S., 459 (joint liability of shipper and carrier for negligence of former in setting fire to property near railroad while car was under his control); *Carson v. Southern Ry. Co.* (S. Car.), 12 R. R. R. 337, 35 Am. & Eng. R. Cas., N. S., 337; *Dufur v. Boston & M. R. Co.* (Vt.), 9 R. R. R. 711, 32 Am. & Eng. R. Cas., N. S., 711; *Minnich v. Lancaster, etc., Ry. Co.* (Pa.), 5 R. R. R. 336, 28 Am. & Eng. R. Cas., N. S., 336; *West Chicago St. R. Co. v. Piper* (Ill.), 9 Am. & Eng. R. Cas., N. S., 147 (passenger injured through negligence of two railroad companies).

Hollins v. New Orleans & N. W. R. Co

Action by Henry Hollins and wife against the New Orleans & Northwestern Railroad Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Frederick Gray Hudson and Hugh Tullis, for appellant.
Dagg & Dale, for appellees.

MONROE, J. This is an appeal from a verdict and judgment for \$2,000 against the New Orleans & Northwestern Railroad Company and the Natchez & Western Railroad Company, for the killing of the plaintiff's child. The facts disclosed by the record are as follows:

On the morning of June 16, 1905, between 10 and 12 o'clock, a mixed train of cars came into the town of Vidalia, and, after discharging its passengers and getting rid of its freight or baggage cars, was reduced to an engine and two coaches, and, at the moment of the killing, was being backed through one of the streets of the town, to the depot, which is situated just inside the levee and at a point where it forms a right angle, so that, as the train approached it, after rounding a curve in the track, one arm of the levee was immediately to its right, and the other crossed its path; the depot being within the angle thus formed.

The train crew consisted of an engineer, a fireman, and a brakeman. The engineer and fireman were at their posts, in the cab of the engine, the brakeman (speaking of the coach, which, as the train was moving, was nearer to the depot, as coach No. 1, and of the other as coach No. 2, and of the end of the train which was nearer the depot as the front, and of the other as the rear, end) was on the rear platform of coach No. 2, next to the engine. There was no one on the front of the train, or any nearer to the front than the brakeman. The conductor was standing at a point about 200 feet distant from that at which the accident occurred, and the weather conditions are not shown to have been unusual. As thus operated, the train reached the depot, which is about 75 feet beyond the point at which the accident occurred, and the engine was detached from the coaches and taken away for other work. Shortly afterwards, it was discovered, by some one in passing, that plaintiff's child, a boy about five years old, had been run over, and, coach No. 2 having been raised by means of jack screws, the body, still warm, but mangled and lifeless, was removed from beneath its rear truck. No one had seen the accident, and, by reason of the curve in the track, and the positions occupied by them, no one connected with the train could have seen it. It is shown that children were accustomed to playing in the street near the place where the accident occurred, and that the railway employees frequently had occasion to warn them away, and (whilst such an admission is hardly necessary) it is admitted, by the conductor

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who had charge of the train, that some one ought to have been in front, keeping a lookout. Under these circumstances, we have no hesitation in finding that the failure to maintain such a lookout was the grossest and most inexcusable negligence, and that it is for those who are responsible for that negligence to show that the tragedy, which would otherwise have been its natural consequence, was, in fact, attributable to some other cause.

The learned counsel for the defense say:

"There can be no doubt, we think, that this lamentable accident was caused by the attempt of the child to steal a ride on the train. In other words, he was a mere trespasser, and, as such, the railroad owed him no duty except not to wantonly injure him. The accident happened from the sudden and unanticipated act of the child itself, which could neither be foreseen nor guarded against."

We are, however, unable, so readily, to assume that a child, five years old, will attempt to steal a ride on a moving railroad train. If, however, the infant had been near enough to the track to have made such an attempt, as the rear end of coach No. 1 was passing, he would have been near enough, when the front end of that coach passed, for the lookout, if there had been one, to have seen him, to have recognized his peril, and to have rescued him, as the train was moving very slowly. But whether the child walked or fell under the train between the coaches, or whether he fell in front of the train, and, coach No. 1 having passed over him, was killed whilst attempting to get out, is a matter of conjecture, and that it is so that a railway train should be so operated, through a public street, where children are known to be in the habit of playing, as, in broad daylight, to run over and kill one of them, without the knowledge of any of the crew, is the most remarkable feature of the case. It is contended that the two companies made defendants do not occupy such a relation to each other as to authorize a judgment against them in *solido*. We think, however, that any reasonable mind, with knowledge of the testimony, and of the facts disclosed in the record, would conclude that, whilst, for the convenience of the parties, the autonomy of the Natchez & Western Railroad Company has been preserved, the company itself is owned and operated by and with the New Orleans & Northwestern Railroad Company; and, if the *prima facie* case thus made out is not the real case, it was for the defendants to show it. The knowledge of their relations is in their possession, and not in the possession of the plaintiff.

Judgment affirmed.

LAND, J., takes no part, not having heard the argument.

On Rehearing.

PROVOSTY, J. After careful reconsideration of this case, the

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court finds no reason for changing the views expressed in the opinion heretofore handed down, or for adding anything to what was there said.

Nothing was said, however, in that opinion touching the prescription of one year pleaded in bar of the suit against the Natchez & Western Railroad Company, and the court will now supply that omission.

The Natchez & Western Railroad Company was cited on both the original and supplemental petitions within the prescriptive period, and the two petitions, together, contained the allegation that the child was negligently killed on the road of said company by one of its trains operated by the other company. This set forth a cause of action against both companies, since, in Louisiana, as a legal conclusion for such a condition of facts, both companies are liable. *Muntz v. Algiers R. R. Co.*, 111 La. 423, 35 South. 624, 64 L. R. A. 222, 100 Am. St. Rep. 495; *Hamilton v. R. R. Co.*, 117 La. 243, 41 South. 560, 6 L. R. A. (N. S.) 787; *I. C. R. R. Co. v. Barron*, 5 Wall. 90, 18 L. Ed. 591; *Ricketts v. C. & O. Co.*, 33 W. Va. 433, 10 S. E. 801, 7 L. R. A. 354, 25 Am. St. Rep. 901; *Railroad Co. v. Brown*, 17 Wall. 445, 21 L. Ed. 675; *Railroad Co. v. Stewart*, 155 U. S. 350, 15 Sup. Ct. 136, 39 L. Ed. 176; *Harden v. Railroad Co.*, 129 N. C. 354, 40 S. E. 184, 55 L. R. A. 784, 85 Am. St. Rep. 747; *Lee v. Southern Pac. R. Co.*, 116 Cal. 97, 47 Pac. 932, 38 L. R. A. 71, 58 Am. St. Rep. 140. Note *Caruthers v. Railroad Co.*, 59 Kan. 629, 54 Pac. 673, 44 L. R. A. 739; *Davis v. Railroad Co.*, 117 La. 325, 41 South. 587.

The judgment heretofore handed down is therefore reinstated and made the final judgment of this court.

SOUTHERN RY. CO. *v.* ISOM.

(Supreme Court of Mississippi, Jan. 20, 1908.)

[45 So. Rep. 424.]

Appeal—Review—Harmless Error—Instructions.—Though in a personal injury action the court might properly have forbidden the reading of a statute of another state wherein the injury was received, and expressed the law entirely in instructions, the judgment will not be reversed because the court permitted the statute to be read.

Damages—Personal Injuries.*—A verdict of \$10,000, awarded a brakeman for the loss of a foot, was not excessive.

Master and Servant—Injury to Servant—Contributory Negligence.—Where a brake was a new patent, which by automatic arrangement fell down when not being used, but at the time a brakeman seated himself on it it was standing upright, and he did not know that it differed from any other brake, it was not negligence per se for him to sit on the brake, barring recovery for injury due to its falling down after he had ridden some distance and throwing him under the wheels.

Appeal from Circuit Court, Alcorn County; E. O. Sykes, Judge.

Action by B. B. Isom against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Isom recovered a judgment against the appellant for \$10,000 for injuries received while acting as a brakeman on a work train; such injuries resulting in the loss of a foot. At the time of the injury the plaintiff was sitting on an upright brake, which fell back on the car and threw plaintiff under the car wheels. The brake was a new patent, which by some automatic arrangement fell down when not being used; but, at the time plaintiff seated himself on it, it was standing upright, and he did not know that it differed from any other brake until after riding some distance, when it fell. On appeal contributory negligence is urged by appellant as one of his grounds of error.

Lamb & Johnston, for appellant.

Young & Young, for appellee.

CALHOON, J. We cannot reverse this case because the court permitted the plaintiff's attorney to read the Alabama statute. This case arose in Alabama, and is determinable by the law

*For all the authorities in this series on the subject, see foot-notes appended to *Campbell v. Railway Transfer Co.* (Minn.), 22 R. R. R. 61, 45 Am. & Eng. R. Cas., N. S., 61, where they are collected.

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of Alabama, and, while the court might very properly have forbidden the reading of that statute, and expressed the law entirely in instructions, we cannot say that permitting it to be read could have had the slightest influence on the verdict. The instructions did cover the law.

On the whole case we do not think that the objection to the instructions granted for the plaintiff should be sustained. If there is any vice in them, and we do not say there is, the learned counsel for the railway company got everything that could have been gotten for their side and neutralized it. We are clearly of the opinion that there should not be a reversal because of the remarks by counsel on a review of this record.

The verdict was not excessive, and the court was clearly right in refusing a peremptory charge to the jury to find for the railway company. It was not contributory negligence for the brakeman to sit on the brake. We think that to do so was not negligence per se, and there was evidence that it was a very common thing to do, and the jury determined that question. The particular brake in point was absolutely new on the railroad, and the plaintiff, a minor, had never been notified of any difference of construction. To sit on a brake of the standard kind, in almost universal use, cannot be negligence. It would certainly be as safe to sit there as to sit on the side of the car, which was simply a dirt car and without standards. As a matter of fact, even if that brake on the Florida car was in proper order, the accident would not have occurred, because, immediately that it was released, it would have fallen flat of itself by an automatic arrangement. In the case at bar it remained upright after release.

Affirmed.

DOGGETT v. CHICAGO, B. & Q. RY. CO.

(Supreme Court of Iowa, June 6, 1907.)

[112 N. W. Rep. 171.]

Railroads—Injuries to Trespassers—Care Required.*—A conductor in charge of a freight train must, in ejecting a trespasser while the train is in motion, exercise ordinary care, and is charged with what he knows, or in the exercise of ordinary care should have known, of the danger of putting a person off a moving train; but he is not charged with knowledge obtained in the exercise of ordinary care of the trespasser's crippled condition.

Trial—Instructions.—It is not error to refuse a requested instruction covered by an instruction given.

Railroads—Injuries to Trespassers—Contributory Negligence.—In determining whether a trespasser, injured while alighting from a train in motion, was guilty of contributory negligence, his physical infirmity may be considered.

Trial—Instructions—Applicability to Evidence.—Where, in an action for injuries received by a trespasser ejected from a train in motion, there was no evidence indicating that, by reason of age or experience, he was less capable than an ordinary person of looking out for his own safety, it was error to refer in the charge to the age and experience of the trespasser in determining whether he was guilty of contributory negligence.

Weaver, C. J., dissenting in part.

Appeal from District Court, Jefferson County; C. W. Vermillion, Judge.

Action to recover damages for personal injuries alleged to have resulted to plaintiff from being ejected in a negligent manner from the caboose of a freight train of defendant, on which he was riding without defendant's consent and as a trespasser. There was a verdict of \$500 in plaintiff's favor, and from the judgment thereon defendant appeals. Reversed.

Crail & Crail and Rollins J. Wilson, for appellee.

Leggett & McKemey, for appellant.

*For the authorities in this series on the subject of the care due trespassers on trains, see foot-notes appended to *Harris v. Southern Ry. Co.* (Ky.), 8 R. R. R. 753, 31 Am. & Eng. R. Cas., N. S., 753, where all the preceding ones are collected, foot-notes appended to *Vassor v. Atlantic Coast Line R. Co.* (N. Car.), 25 R. R. R. 629, 48 Am. & Eng. R. Cas., N. S., 629; foot-notes appended to *Massel v. Boston Elev. Ry. Co.* (Mass.), 21 R. R. R. 57, 44 Am. & Eng. R. Cas., N. S., 57; *Graham v. Chicago, etc., Ry. Co.* (Iowa), 20 R. R. R. 811, 43 Am. & Eng. R. Cas., N. S., 811; foot-notes appended to *Toledo, etc., R. Co. v. Gordon* (C. C. A.), 20 R. R. R. 544, 43 Am. & Eng. R. Cas., N. S., 544.

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McCLAIN, J. The plaintiff, 17 years of age, with a companion, boarded the way car of defendant's freight train about a mile west of Fairfield, with the intention of riding into town without paying any fare. The evidence tends to show that the conductor of the train told them the train would not stop at Fairfield, and ordered them to get off, and, in attempting to do so while the train was in motion, plaintiff, who was somewhat incapacitated by having a crippled leg, fell, breaking his crippled leg and receiving other injuries.

1. The jury was instructed, with reference to the act of the conductor in ordering plaintiff to get off the car while the train was in motion, that, if the train was moving at so low a rate of speed as that a person in possession of ordinary use of his limbs and of ordinary activity could have alighted therefrom in safety, "and that said conductor did not know, and in the exercise of ordinary care could not under the circumstances have known, that plaintiff was crippled and did not possess the ordinary use of his legs, and the injury to plaintiff was caused by his crippled condition, and not by the speed of the train, then the defendant would not be chargeable with negligence on account of the acts of the conductor." Bearing in mind that the plaintiff was confessedly a trespasser, to whom the defendant owed no affirmative duty, we think this instruction was plainly erroneous. It was only so far as the conductor had knowledge of an injury likely to result from compelling the plaintiff to get off the train while in motion that defendant would be chargeable with the consequences of the conductor's act. *Earl v. Chicago, R. I. & P. R. Co.*, 109 Iowa, 14, 79 N. W. 381, 77 Am. St. Rep. 516; *Thomas v. Chicago, M. & St. P. R. Co.*, 93 Iowa, 248, 61 N. W. 967; *Clemans v. Chicago, R. I. & P. R. Co.*, 128 Iowa 394, 104 N. W. 431; *Cleveland, C. & C. R. Co. v. Terry*, 8 Ohio St. 570. The rule that the conductor should have acted with reference to what might have been known to him, in the exercise of reasonable care, with reference to plaintiff's condition, might have been applicable if plaintiff, having rightfully entered upon the train, was being ejected for some misconduct on his part which justified the conductor in ejecting him; but, being from the first a trespasser, the conductor owed him no affirmative duty. The rule as to the care required in ejecting a trespasser is not the same as that which applies in case of the ejection of one who has been rightfully on the train. *Earl v. Chicago, R. I. & P. R. Co.*, *supra*. In the case last cited it was said that, to render the railroad company liable under such circumstances, the action of the conductor must be wanton and willful, and we have no inclination to modify the rule announced in that case; but it is sufficient for the present case to say that the instruction charging the conductor with the affirmative duty of ascertaining

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whether plaintiff was a cripple before putting him off the train was erroneous. We think the instruction charging the conductor with the exercise of ordinary care in putting plaintiff off the train, and saying that in doing so he was charged with what he knew, or in the exercise of ordinary care should have known, as to the danger of putting a person off a moving train, was correct. Even as to trespassers, the conductor should take into account that which an ordinarily prudent person would know might be the probable consequences, in view of the speed of the train, of causing a person to alight therefrom. *Johnson v. Chicago, St. P., M. & O. R. Co.*, 123 Iowa, 224, 98 N. W. 642. An instruction asked for plaintiff, and refused, to the effect that to charge defendant the injury must have been the result of the negligent act of the conductor, in view of the knowledge he had of plaintiff's condition, was sufficiently covered by an instruction given, and it was not error to refuse it.

2. In one of the instructions given, the jury were directed to take into account the age, experience, and physical infirmity of the plaintiff in determining whether he was guilty of contributory negligence in jumping off the train under the circumstances. So far as physical infirmity was concerned, this instruction was, no doubt, correct, for while the conductor was not bound to take into account plaintiff's infirmity, unless he had knowledge thereof, yet, on the other hand, in determining whether plaintiff was negligent, the jury was justified in taking that fact into consideration. *Cleveland, C. & C. R. Co. v. Terry*, 8 Ohio St. 570. But in so far as the instruction allowed the jury to take into account the plaintiff's age and experience, we think that it was erroneous. The manifest purpose of the instruction was to advise the jury that they might find the plaintiff, on account of his immaturity of age and want of experience, to be free from contributory negligence. The evidence showed plaintiff to have been over 17 years of age at the time of the accident, and there is nothing to indicate that he did not possess the discretion which is usually possessed by persons of that age; nor is there anything to indicate that he did not by reason of exceptional want of opportunity know that it was dangerous to jump from a moving train. Unless, therefore, the mere fact of his age, was in law sufficient to justify a finding by the jury that he was not required to use the same care as ordinary persons are required to use, it was error to instruct the jury that they might take into account his age in determining the question of his contributory negligence. We suppose it would hardly be contended that, if plaintiff had been over 21 years of age, it would have been competent to tell the jury they might take his age into account. There must be some limit in law as to what may be considered in excusing acts which on the part of ordinary persons would as a matter of law

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constitute contributory negligence. That persons under 21 years of age, that being the age of majority with reference to political rights and the capacity to make binding contracts, are not to be presumed on that account to be less capable than persons of ordinary prudence to exercise care and discretion with reference to their safety, is manifest. No court, so far as we can discover, had made the age of 21 the dividing line in regard to responsibility for acts constituting negligence in an ordinary person, and it has been expressly held that as matter of law such distinction does not exist. *Nagle v. Allegheny Valley Railroad Co.*, 88 Pa. 35, 32 Am. Rep. 413; *Pueblo Electric Street Ry. Co. v. Sherman*, 25 Colo. 114, 53 Pac. 322, 71 Am. St. Rep. 116. We must therefore adopt some other rule applicable to such cases, or leave the jury free to arbitrarily recognize any excuse which may appeal to their sentiments or prejudices. *Nagle v. Allegheny Valley R. Co.*, 88 Pa. 35, 32 Am. Rep. 413; *Tucker v. New York Central & H. R. R. Co.*, 124 N. Y. 308, 26 N. E. 916, 21 Am. St. Rep. 670; *Frauenthal v. Gaslight Co.*, 67 Mo. App. 1, 11; *Pueblo Elec. St. Ry. Co. v. Sherman*, 25 Colo. 114, 53 Pac. 322, 71 Am. St. Rep. 116. As was said in the *Tucker Case*, *supra*, "aside from evidence of the boy's age, no fact was adduced tending to show that he was not as well qualified to understand and appreciate the danger which overtook him as an adult, and the question is therefore fairly presented whether the jury can be permitted to find from such fact, standing alone, that he was *non sui juris*. * * * In the absence of evidence tending to show that an injured infant 12 years old was not qualified to understand the danger and appreciate the necessity for observing that degree of caution in crossing a railroad track which an adult would, he must be deemed *sui juris*." And the court therefore held that a verdict in favor of the administrator of a child of that age, killed by the train of a railway company at a highway crossing, must be set aside on account of contributory negligence of the child in not looking and listening for the approach of a train; there being nothing but the child's age to indicate that he was free from contributory negligence.

It is difficult, under the authorities, to state any satisfactory rules of universal application as to the effect of the age of the injured person with reference to the question of contributory negligence. Courts have apparently been reluctant to announce definite rules on the subject; but in several of the best considered cases the distinctions as to responsibility on account of age recognized in the criminal law have been regarded as furnishing the best guidance in determining responsibility for negligence. Thus, in *Nagle v. Allegheny Valley R. Co.*, 88 Pa. 35, 32 Am. Rep. 413, it is said that in analogy with the rule that after 14 years of age an infant may choose a guardian and contract a law-

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ful marriage, and must be held responsible for his crimes to the same extent as an adult, an infant 14 years of age "is presumed to have sufficient capacity and understanding to be sensible of danger, and to have power to avoid it." Accordingly, it was held in that case that, under evidence, which would have charged the deceased, for whose death on account of the negligence of the defendant recovery was sought, with contributory negligence had he been an adult, there could be no recovery, although it appeared that the deceased, who was killed while attempting to cross a railroad track in front of a moving train, was between 14 and 15 years of age. In *Tucker v. New York Central & H. R. R. Co.*, 124 N. Y. 308, 26 N. E. 916, 21 Am. St. Rep. 670, the rule announced in the Pennsylvania case is approved, and, as in New York 12 years is fixed by statute as the age after which criminal responsibility of an adult attaches, it is held that after that age a boy must be deemed *sui juris* and chargeable with the same measure of caution as is an adult. In *Lynchburg Cotton Mills v. Stanley*, 102 Va. 590, 46 S. E. 908, the standard of criminal responsibility is applied in determining negligence, and it is held that between the ages of 7 and 14 years a child is presumed to be incapable of contributory negligence, while after the latter age no such presumption exists. And in *Chicago City R. Co. v. Wilcox*, 138 Ill. 370, 27 N. E. 899, 21 L. R. A. 76, the same standard is recognized, with a question whether under seven years of age a child is to be conclusively presumed incapable of contributory negligence.

An examination of a very large number of cases relating to the liability of children for contributory negligence leads to the conclusion that, while in many of them no definite rule is announced, they substantially without conflict hold that the presumption of responsibility attaches at the age of 14 years; that prior to that age there is a presumed incapacity which must be overcome in order to defeat recovery on account of contributory negligence by proof that the child did not exercise the care and discretion usual with children of a similar age, which is assumed to be less than that required of persons of mature years; while after that age the presumption is that there is the capacity for care and discretion with reference to the usual affairs of life possessed by persons of ordinary intelligence, irrespective of age, and that to authorize the jury to take age into account there must be some proof that by reason of immaturity the injured person was less capable than an ordinarily prudent person of exercising care and discretion for his own safety. In addition to the cases already cited, reference may profitably be made to the following: *Coleman v. Himmelburger-Harrison Land & Lbr. Co.*, 79 S. W. 981, 105 Mo. App. 254; *Crown v. Orr*, 140 N. Y. 450, 35 N. E. 648; *Hickey v. Taaffe*, 105 N. Y. 26, 12 N. E. 286; *Higgins Car-*

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pet Co. v. O'Keefe, 79 Fed. 900, 25 C. C. A. 220; Koehler v. Syracuse Specialty Mfg. Co. (Sup.) 42 N. Y. Supp. 182, 1105; McDonald Metropolitan Street R. Co. (Sup.) 80 N. Y. Supp. 577; Holmes v. Missouri Pacific R. Co., 190 Mo. 98, 88 S. W. 623; Shelley v. City of Austin, 12 S. W. 753, 74 Tex. 608. The cases may be found fully collected in 1 Thompson, Negligence (2d Ed.) §§ 307-318; 2 Current Law, 1004; 4 Current Law, 774; 6 Current Law, 764. And as announcing the rule already suggested, as drawn from the volume of cases on the subject, see Bishop, Noncontract Law, §§ 585-587.

The decisions of this court are in harmony with the rules above suggested, as deducible from examination of the authorities in other states. It has been repeatedly held, with reference to children of tender years, that they are not chargeable with contributory negligence, and, so far as we now discover, the cases in which this ruling has been made have been cases where the children were under seven years of age. Fink v. Des Moines, 115 Iowa, 641, 89 N. W. 28; Thomas v. Chicago, M. & St. P. R. Co., 93 Iowa, 248, 61 N. W. 967; Fishburn v. Burlington & N. W. R. Co., 127 Iowa, 483, 103 N. W. 481. In cases involving the negligence of children between 7 and 14 years of age, we have held that they might under the circumstances of the particular case be guilty of negligence in not giving such attention to their surroundings and exercising such care to avoid danger as may fairly and reasonably be expected from persons of their age and capacity. Merryman v. Chicago, R. I. & P. R. Co., 85 Iowa, 634, 52 N. W. 545; Carson v. Chicago, R. I. & P. R. Co., 96 Iowa, 583, 65 N. W. 831; Benton v. Chicago, R. I. & P. R. Co., 55 Iowa, 496, 8 N. W. 330; Masser v. Chicago, R. I. & P. R. Co., 68 Iowa, 602, 27 N. W. 776; McMillan v. Burlington & M. R. R. Co., 46 Iowa, 231. In no case decided in this court, so far as we can discover, has it been held that the fact of age alone gave rise to any presumption, or was entitled to consideration, where the person whose negligence was in question was over 14 years old. In Shebeck v. National Cracker Co., 120 Iowa, 414, 94 N. W. 930, with reference to an injury to an inexperienced boy of 18 years, it was said: "The degree of care he was bound to exercise to absolve himself from contributory negligence is such care as might reasonably be expected from one of his age and experience under like circumstances and surroundings." However, the case was not one involving contributory negligence, but assumption of risk; and the contention of the administrator of the boy, who was killed by being caught in the machinery of a factory in which he was at work, was that he had not assumed the risk of the defective condition of the machinery, although he was aware of its condition, and had remained in the employment without objection. The question of

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the assumption of risk of the dangers of a particular employment is very different from that involved in the determination of the question whether under ordinary circumstances and conditions an injured person has exercised the care which a reasonably prudent person would exercise for his own safety. It may be that the age and experience of a person over 14 years of age may be taken into account in determining whether he appreciates the danger of a particular hazard, where the hazard is peculiar to a special employment, and not such as ordinary persons are called upon to meet; but it will not do to say that an act, such as that of jumping off a train while in motion, which is made criminal in all persons over 14 years of age (see Code, § 4811), is not negligent in a person of that age, if an ordinary adult would be charged with negligence under the same circumstances.

We reach the conclusion, therefore, that, in the absence of any evidence indicating that by reason of age or inexperience, save the mere incidental fact that he was 17 years of age at the time of the accident, plaintiff was less capable than an ordinary person in looking out for his own safety, it was error for the court to refer to the matter of age and experience as proper for the consideration of the jury in determining whether plaintiff was guilty of contributory negligence.

3. Misconduct of counsel for plaintiff, in his closing address to the jury, is also urged as a reason why this judgment should be reversed. Some portions of this argument, as they appear in the record, cannot be justified, and we doubt whether any objection which could have been made thereto at the time, or any ruling which the court could have entered in response to such objection, would have obviated the prejudice likely to result. Perhaps, it might be said, if there had been prompt objection, the improper course of argument would not have been persisted in, and that prejudice on that ground might have been avoided. In view of the necessity of a new trial, it is enough to call attention to the subject by way of caution. Perhaps even this is unnecessary, as the counsel whose argument is complained of has practically confessed the impropriety of the argument made.

The judgment of the trial court is reversed.

WEAVER, C. J. I concur in the result on the first point discussed in the foregoing opinion, but dissent from the conclusion announced in the second paragraph.

BEASLEY v. NEW ORLEANS & N. E. R. Co.

(Supreme Court of Mississippi, March 9, 1908.)

[45 So. Rep. 884.]

Justices of the Peace—Certiorari—Amendment of Petition.—Where a petition for certiorari was based on the ground that a judgment of default had been taken in the justice court before it was authorized, it was competent to amend it in the circuit court by adding as a ground that the judgment had been taken for a sum in gross, without testimony to show the value of the property involved.

Railroads—Injuries to Animals—Failure to Fence Railroad.—In the absence of any law requiring a railroad company to fence its right of way, the right to recover for stock killed on the track cannot be based on the fact that defendant's fence was insecure.

Same.—In an action against a railroad company for killing stock which had strayed on defendant's right of way, it appeared that the stock had strayed on the track during the night at a point where there was a curve and a downgrade, and that a freight train running at a lawful rate came upon the curve, killing the stock. Held, that no negligence on the part of defendant was shown.

Appeal from Circuit Court, Perry County; W. H. Cook, Judge.

Action by E. L. Beasley against the New Orleans & North-eastern Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Action by appellant against appellee for the killing of 12 head of cattle by the locomotive of the appellee railroad company. After hearing all the evidence, the court instructed the jury to find for defendant, and plaintiff appeals. The action of the court in permitting the defendant below to amend its certiorari petition in the circuit court, so as to bring in new matter, is assigned as error, as is also the action of the court in granting a peremptory instruction for the defendant railroad company; the plaintiff contending that the jury should have been permitted to say whether or not there was negligence on the part of the railroad company, either in failing to keep its wire fence secure so that plaintiff's cattle could not have broken through it and gotten on the track, or in running at an unlawful rate of speed at the time of the killing of the cattle. The record, however, fails to show that the locomotive was running at an unlawful rate of speed, or that the killing of the cattle occurred in an incorporated town.

J. T. Garroway, for appellant.

Bozeman & Fewell and *McWillie & Thompson*, for appellee.

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CALHOON, J. The first writ of certiorari in this case was based on the ground that a judgment by default had been taken in the justice's court before five days from service of process had elapsed before the trial. It was perfectly competent to amend the petition in the circuit court by adding the ground for the issuance of the writ that the judgment in the justice's court had been taken for a sum in gross for the killing of the cattle, without taking testimony to show value. *Evans v. Railway Co.*, 74 Miss. 230, 21 South. 15; *Miss. Central R. R. Co. v. Fort*, 44 Miss. 423. Under the statute amendments are liberally awarded in the circuit court on appeals from justices' courts, and in the particular instance it is not possible that any harm could have resulted.

On this record nothing can be predicated of the insecure wire fence of the railroad company on the right of way, through which fence the cattle got that were killed, because no law requires such fence. We look in vain in the record for any proof showing, with any sort of satisfaction, that the killing was done in any incorporated town. The facts are that Mr. Beasley had bought about 70 head of cattle, which he put in a pasture belonging to a Mr. Ellis on the side of the railroad track. On the side of the railroad company's right of way there was no inclosure other than that of the railroad company's right of way wire fence. During the night, it seems, some of the cattle got through this wire fence and went upon the railroad track, where some of them were lying down and some standing up. At that point there was a curve and a downgrade. A freight train, running at a lawful rate, came upon the curve, on which curve, of course, the headlight was shed straight ahead. This action is to recover damages for killing some of that stock, on the idea that the killing by the locomotives made a *prima facie* case of negligence on the part of the railroad company. Granting this, it is none the less true that the railway company may exonerate itself by showing that there was in fact no negligence. This, we think, has been done by the uncontradicted testimony for the company, under the authorities in Mississippi—*Illinois Cent. R. Co. v. Walker*, 63 Miss. 13; *Southern Ry. Co. v. Murry*, 39 South. 478; *Yazoo & M. V. R. Co. v. Whittington*, 74 Miss. 410, 21 South. 249; *New Orleans & N. E. R. Co. v. Bourgeois*, 66 Miss. 3, 5 South. 629, 14 Am. St. Rep. 534; *Alabama & V. Ry. Co. v. Stacy*, 35 South. 137—cited by counsel, and we think the peremptory instruction to find for the railway company was proper.

Affirmed.

DOLPH v. LAKE SHORE & M. S. RY. CO.

(Supreme Court of Michigan, July 15, 1907.)

[112 N. W. Rep. 981.]

Evidence—Evidence at Former Trial—Absence of Witness.—Where it is established that a witness at a former trial of the case is beyond the jurisdiction of the court, his testimony in the former trial may be read to the jury.

Trial—Misconduct of Counsel—Appeal to Prejudice.*—In an action against a railroad for causing the destruction of a house by fire, language of plaintiff's counsel in addressing the jury, which in effect asked them to discredit defendant's witnesses because defendant was a railroad company, is ground for setting aside the verdict.

Railroads—Fires—Actions—Negligence—Question of Law.—Under Comp. Laws, § 6295, providing that a railroad shall not be liable for fires originating from the railroad if it prove that the fire originated from an engine, the machinery of which was in good repair and properly managed, when the railroad company has established by reputable and uncontroverted evidence that its appliances were such as good railroading requires, and that they were in the condition required by law, and properly managed, the question of its negligence is a question of law for the determination of the court.

Error to Circuit Court, Lenawee County; Guy M. Chester, Judge.

Action by Wira H. Dolph against the Lake Shore & Michigan Southern Railway Company. From a judgment for plaintiff, defendant brings error. Reversed, and new trial ordered.

Plaintiff's house, a small, one, situated about 100 feet from the track of the defendant's road, and woodshed, situated about 80 feet from the track, were destroyed by fire. No one was in the occupancy of the house at the time; neither was any one near when the fire started. The house had been vacant for about two months. It was an exceedingly dry time. The grass along the right of way was dry. A very strong wind was blowing directly across the track towards the buildings. The ground was burnt over at one point to within 81 feet of the track. The point at which the fire started and its distance from the track are of course unknown. The negligence charged in the declaration is "the failure to keep its engines in proper condition and repair

*For the authorities in this series on the subject of arguments and remarks of counsel reflecting on the credibility of witnesses, etc., see foot-notes appended to *Pullman Co. v. Pennock* (Tenn.), 25 R. R. R. 179, 48 Am. & Eng. R. Cas., N. S., 179; foot-note appended to *Whipple v. Michigan Cent. R. Co.* (Mich.), 23 R. R. R. 767, 46 Am. & Eng. R. Cas., N. S., 767.

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so as to prevent the escape of sparks." In reply to special questions the jury found that the engine was properly managed, but that it was not in good order. The case was submitted to the jury, who rendered a verdict for the plaintiff of \$750.

Argued before MCALVAY, C. J., and GRANT, BLAIR, MONTGOMERY, OSTRANDER, HOOKER, and CARPENTER, JJ.

Weaver, Morgan & Priddey and *Dallas Boudeman*, for appellant.

Bird & Sampson and *John A. Riley*, for appellee.

GRANT, J. (after stating the facts). 1. One McKenzie was a witness for the defendant on a former trial. He was not called by it upon this trial. After the defendant had rested its case, plaintiff was permitted to read to the jury the testimony of this witness upon the former trial. It seems to have been conceded that the witness was beyond the jurisdiction of the court. If the plaintiff failed to show that the witness was beyond the jurisdiction of the court, it was error to admit the reading of his testimony. If he had established the fact that the witness was beyond the jurisdiction of the court, then the testimony was admissible under *Hudson v. Roos*, 76 Mich. 173, 180, 42 N. W. 1099.

2. Counsel for the defendant strenuously insist that there is no evidence that the engine was out of repair. They base this insistence upon the testimony of those who examined the smoke-stack and appliances shortly before and shortly after the fire. Without detailing the evidence, we are unable to hold that there was no evidence to sustain the verdict.

3. In addressing the jury, plaintiff's counsel said: "Any one who may have a fire will find some one coming from the railroad company to testify that the engine was in proper repair. * * * You and I may be in error. You make mistakes and so does it; but you will not make any if you are a railroad man, and if a request is made to your company to pay some man whose house was burned." Speaking of a witness for defendant, counsel said: "But my brother says: 'Here is Mr. Osler, and he comes here, and he isn't interested at all. He is not working for the Lake Shore now.' Well, but he was working for the Lake Shore when he swore here upon the other trial. He tells you he left there in February some time. He is on record. He can't go back now and change his testimony. He was just as much under the thumb of the Lake Shore this time as before, because he was already on record in this court." Again: "It has been said that juries will find verdicts against the railroad companies simply because they are railroad companies. * * * If railroad companies have earned that sort of a reputation, who is to blame for it but the railroad company itself? The treat-

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ment that they have given the people has driven to that, if that is the case." This last statement does not seem to be referred to in defendant's brief. We do not therefore treat it as a reversible error, but look at it only to ascertain the spirit with which the former statements were made. Here is clearly an appeal to the prejudice of the jury. They are asked, in effect, to discredit defendant's witnesses, because defendant is a railroad company. It is as if counsel said: "Don't give railroad companies a fair trial, because they are railroad companies." I think every one will concede the injustice of such arguments. It is clearly our duty to condemn them, and to protect litigants from their injurious consequences. That duty compels us to set aside plaintiff's verdict, and to grant a new trial.

4. The principal and most important question presented upon the record is, does the statute (Comp. Laws, § 6295) require the issue of fact to be submitted to the jury, where the *prima facie* case, made by the setting of the fire, is met by uncontradicted evidence that the engine had the necessary appliances—was in good condition and properly managed? Upon this question a re-argument was ordered, and the court had the benefit of able arguments and an exhaustive discussion of the authorities. The learned counsel for the plaintiff insist that the statute leaves the question to the jury. Legislatures may make, and have made, railroads absolutely liable for all fires set by their engines. *Campbell v. Missouri, etc., Ry. Co.*, 121 Mo. 340, 25 S. W. 936, 25 L. R. A. 175, 42 Am. St. Rep. 530; 2 *Thomp. Law of Neg.* § 2341. The making of a *prima facie* case by simple proof of the setting of the fire arose out of the difficulty of a plaintiff to prove the defect, and from the fact that the construction, condition, and management of the engines are peculiarly, if not exclusively, within the knowledge of the company's employees. The rule is reasonable. The railroad company must show that its engines are of the kind and in the condition required by the law. Where witnesses, whose integrity there is no reason to doubt, testified that they made at the time personal examination, and that everything was in good order, and, it being a conceded fact that the best of engines will sometimes set fire, does the law mean that a jury, under these circumstances, can ignore such testimony, and base a verdict of "guilty of negligence" upon the bare fact that the fire was set by the engine? The statute does not so provide in terms. Its language does not necessarily imply that the Legislature intended to make the question solely one for the jury. It is a radical departure from the just rule of the common law that he who asserts a tort must prove it. The statute provides: "That such railroad company shall not be held so liable if it prove to the satisfaction of the court or jury, that such fire originated from fire by engines whose machinery, smoke-stack or fire-boxes

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were in good order and properly managed." Comp. Laws, § 6295. The statute shifts the presumption of nonnegligence to a presumption of negligence. See *Fisk v. Wabash, etc., Ry. Co.*, 114 Mich. 248, 72 N. W. 205. We there said: "The statute does not change the common-law liability for setting fires. It simply shifts the burden of proof upon the defendant to show that such fires were not negligently set."

Counsel for plaintiff cite but one case in Michigan bearing upon the subject. *Hagan v. Chicago, etc., Ry. Co.*, 86 Mich. 615, 49 N. W. 509. In that case there was evidence of negligence ample to sustain the verdict of the jury. The court said: "The jury were entitled to consider, as bearing upon the question of negligence, not only defendant's testimony as to the condition of the locomotive, the competency and skillfulness of the engineer and fireman, and the proper management of the locomotive on that occasion, but also the testimony as to the poking of the fire, its effect upon the emission of sparks, and, in that connection, defendant's testimony that it was unnecessary to poke the fire." There was also testimony in that case that an engine in good order and properly managed could not possibly throw fire 160 feet from the track. Counsel cite *Hemmi v. Chicago, etc., Ry. Co.*, 70 N. W. 746, 102 Iowa, 25. That case is based upon *Greenfield v. Railroad Co.*, 83 Iowa, 270, 49 N. W. 95. The statute in Iowa provides that the railroad company "shall be liable for all damages by the fire that is set out or caused by operating of any such railway." In terms that statute imposed an absolute liability. The court construed it as not imposing an absolute liability, and held that the liability depends upon the fact of negligence. The court held that the proof of damages raised the presumption of negligence, and that "negligence being presumptively established, has for its support every fact by which it might have been established upon proof." The court then proceeds to show that the evidence on the part of the company did not negative every possible act of negligence. The court further said that the construction of this section required a holding of absolute liability of such fires, or such a rule as this as to presumption. The difference between the two statutes is apparent. The case of *Burud v. Great Northern Ry. Co.*, 62 Minn. 243, 64 N. W. 563, does not sustain the plaintiff's position. The court in that case expressly say: "There is no doubt of the correctness of the proposition, urged by the defendant's counsel, that the statutory presumption is a disputable one of fact, which may be rebutted by showing that the defendant did use due care and was not negligent; that the effect of the statute is merely to cast the onus or burden on the defendant to prove that it was not negligent; also, that, if the evidence to that effect is conclusive, a verdict for the plaintiff could not be sustained."

We do not think that the statute of Michigan makes an issue

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of fact that must, under all circumstances, be left to the jury. When the railroad company has established by reputable and uncontroverted evidence that its appliances were such as good railroading requires, that they were in the condition required by the law, and properly managed, we think the question is one of law for the determination of the court, and not one of fact to be decided by the jury. Suppose the engine setting fire was new and on its first trip; that its makers testified that it was all the law required; that it was established beyond controversy that it was properly equipped and properly managed, and it was a conceded fact that all properly constructed engines will sometimes emit fire; can it be said that there is any tangible evidence of wrongdoing on the part of the company? We think not. The company in such case has completely rebutted the *prima facie* case which the statute has created, and is entitled to have a verdict directed in its favor. In *Daly v. Chicago, etc., Ry. Co.*, 43 Minn. 319, 45 N. W. 611, it was held that the evidence introduced by the defendant was as broad as the presumption, and satisfactorily rebutted any legal inference of negligence. In *Smith v. Northern Pacific Ry. Co.*, 3 N. D. 17, 53 N. W. 173, it was held that "when the whole case, independently of this artificial presumption, shows that there was no negligence, the presumption cannot be considered for the purpose of making an issue for the jury." In *Menominee, etc., Co. v. Milwaukee, etc., Ry. Co.*, 91 Wis. 447, 65 N. W. 176, it was held that under the statute "the presumption was indulged in merely for the purpose of putting the company to proof, and compelling it to explain and show, with a reasonable and fair degree of certainty, * * * that it had performed its duty in this particular." It was held that the proof overcame any inference arising from the mere fact that sparks and cinders escaped and communicated fire. Without discussing the authorities further, the same holding may be found in *Southern Ry. Co. v. Pace*, 40 S. E. 723, 114 Ga. 712; *St. Louis, etc., R. Co. v. Ludlum*, 50 Pac. 456, 6 Kan. App. 700; *Spaulding v. Chicago, etc., R. Co.*, 33 Wis. 582; *Kentucky Cent. R. Co. v. Talbot*, 78 Ky. 621. The rule is founded in justice and sound reason. See, also, *Ann Arbor R. Co. v. Fox et al.*, 92 Fed. 494, 34 C. C. A. 497.

I do not deem that the words "to the satisfaction of the court or jury" are of any significance, or tend to show any intention to take a question of law from the court and submit it to the jury. These words are purely expressive of the common-law rule, for in every case the proofs must justify a verdict or a judgment to the satisfaction of the court or jury before which the case is tried. The statute with these words eliminated would mean exactly the same as it does with them in. Under our Constitution and system of jurisprudence the determination of ques-

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tions of law belongs to the court, and, as a general proposition, the Legislature has no power to take that determination away from the judges and transfer it to a jury. The intention of the Legislature to take away that power from the judges cannot rest upon presumption, but upon language from which no other intention can be inferred. In every suit at law the plaintiff must by proofs make a case to sustain a verdict and judgment. When the evidence is concluded, the court must determine whether in law there are facts shown to sustain the plaintiff's claim. If different conclusions can be drawn from conceded facts, or if the facts are in dispute, the question belongs to the jury. I do not discuss the question whether this power exists as to railroad corporations. It is sufficient in this case to hold that no such intention can, in my judgment, be inferred from the terms of the statute. For want of a better term I have said in this opinion that the setting of the fire makes a *prima facie* case for plaintiff. This may not be strictly accurate, but names are immaterial. The statute imposes a liability for fires originating in the operation of the road only when the company fails to make the proof of the facts which are a complete defense.

Judgment reversed, and new trial ordered.

MOORE, J., took no part in the decision.

GESAS v. OREGON SHORT LINE R. CO.

(Supreme Court of Utah, Dec. 21, 1907.)

[93 Pac. Rep. 274.]

Trial—Nonsuit—Motion—Specification of Grounds.—A motion for nonsuit must specify wherein it is claimed the proof is deficient, so that plaintiff may supply it, if he is able to do so.

Same.—Where, on motion for nonsuit, plaintiff offered to supply proof as to the points wherein it was claimed to be deficient, and such offer would have occasioned no unreasonable delay in, or interference with, the trial, he ought to have been permitted to do so, since, if not afforded such opportunity, the rule requiring specification of particulars on which the motion of nonsuit is based is in part rendered useless.

Witnesses—Competency—Means of Knowledge.—That offered witnesses, in an action for injury sustained in attempting to pass between cars obstructing a crossing, were boys 9 and 12 years old, who had been standing between trains and were climbing over the cars, did not authorize the court to conclusively assume that they had no such means or opportunity as to have heard the bell had it rung, or that there was such a want of attention on their part as to prevent their hearing it had it rung.

Trial—Nonsuit.—Where plaintiff's offer on a motion for nonsuit was not offered witnesses would merely testify that they did not hear the bell, but that the bell did not ring, and the whistle did not blow, the court ought either to have assumed the fact in evidence as offered, or to have given plaintiff an opportunity to so prove it, and not merely have assumed the fact in evidence that witnesses did not hear the bell.

Railroads—Operation—Duty to Use Care.—The duty of a railroad company to use reasonable care in the operation of trains is not confined alone to crossings, but applies to all cases where the failure to exercise it may result in injury to others.

Same—Injuries to Persons on Track—Evidence—Sufficiency.—Evidence, in an action for injury sustained in attempting to pass between cars obstructing a crossing, held to warrant a finding that the trainmen in the exercise of ordinary care ought to have anticipated that persons might be in the act of crossing, or be on or between or about the cars, and that not to give warning before moving the train would result in injury.

Same.—Where trainmen in charge of a train obstructing a crossing, in the exercise of ordinary care, ought to have anticipated that persons might be in the act of crossing, or be on or between or about the cars, and that not to give warning before moving the train would

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result in injury, it was their duty to give such warning and failure to do so was negligence.

Same.—Where railroad crossings had been obstructed for an hour or more, and many persons had passed between or over the cars to the trainmen's knowledge, negligence in moving the train without warning did not depend on notice to the trainmen that the particular person injured was between or on the cars or that his position was one of peril when the train was moved.

Same—Trespasser.*—One who had remained at a railroad crossing obstructed by a train about half an hour, and then climbed on the cars for the purpose of crossing, was not a trespasser, to whom the railroad company owed no duty until it discovered his danger.

Same—Evidence—Sufficiency.—In an action for injury sustained in attempting to pass between cars obstructing a crossing, the railroad company's negligence held for the jury.

Negligence—Degree of Care Required—Children.†—The degree of care required of a child must be graduated to its age, capacity, and experience, and measured by what might ordinarily be expected from a child of like age, capacity, and experience under similar circumstances.

Railroads—Injuries to Persons on Track—Question for Jury.—Whether a child 8 years old was guilty of contributory negligence in attempting to cross between cars obstructing a railroad crossing, held for the jury.

Appeal from District court, Third District; M. L. Ritchie, Judge.

Action by Jesse Gesas, by his guardian *ad litem*, Morris Levy, against the Oregon Short Line Railroad Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded for a new trial.

Powers & Marioneaux, for appellant.

P. L. Williams, Geo. H. Smith, and J. G. Willis, for respondent.

*For the authorities in this series on the subject of the right of a person to pass under or over a train obstructing a crossing, see extensive note, 16 R. R. R. 325, 29 Am. & Eng. R. Cas., N. S., 325; foot-notes appended to *Russell v. Central of Georgia Ry. Co. (Ga.)*, 12 R. R. R. 310, 35 Am. & Eng. R. Cas., N. S., 310; foot-notes appended to *Sheridan v. Baltimore & O. R. Co. (Md.)*, 16 R. R. R. 767, 39 Am. & Eng. R. Cas., N. S., 767.

†See first foot-note appended to *St. Louis, etc., Ry. Co. v. Sparks (Ark.)*, 25 R. R. R. 739, 48 Am. & Eng. R. Cas., N. S., 739; foot-notes appended to *Serano v. New York, etc., R. Co. (N. Y.)*, 25 R. R. R. 293, 48 Am. & Eng. R. Cas., N. S., 293; foot-notes appended to *Dugan v. Boston & M. R. R. (N. H.)*, 24 R. R. R. 797, 47 Am. & Eng. R. Cas., N. S., 797; foot-notes appended to *Illinois Cent. R. Co. v. Johnson (Ill.)*, 24 R. R. R. 213, 47 Am. & Eng. R. Cas., N. S., 213; foot-notes appended to *Van Salvellergh v. Green Bay Traction Co. (Wis.)*, 23 R. R. R. 330, 46 Am. & Eng. R. Cas., N. S., 330.

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STRAUP, J. This was an action brought by plaintiff to recover damages for personal injuries alleged to have been sustained by the negligence of the defendant. The accident occurred at Blackfoot, in the state of Idaho. The plaintiff, at the time of the accident, was 8 years of age. It was alleged in the complaint that the defendant obstructed certain street crossings in Blackfoot for 30 minutes by suffering and permitting a train of freight cars to stand upon the street; that the plaintiff and other children desired to pass over one of the crossings thus obstructed; before doing so the plaintiff inquired of the brakeman in charge of the train how long it would stand before the cars would be moved; that the brakeman told him that the cars would not be moved for half an hour; that while the plaintiff, relying upon what the brakeman told him, was attempting to pass between two cars, the servants of the defendant in charge of the train, and with knowledge of the plaintiff's presence, negligently, and without warning, moved the cars, by reason of which the plaintiff was injured. The answer was a general denial and a plea of contributory negligence. At the conclusion of plaintiff's case the defendant's motion for nonsuit was granted, from which judgment of nonsuit the plaintiff has prosecuted this appeal.

The evidence shows that the railroad tracks run north and south through the town of Blackfoot dividing the business district on the one side and the residence district on the other. Three crossings were blocked by two freight trains, one called the "Mackey" and the other the "St. Anthony" train, for something over an hour. Plaintiff's father testified: "I went to dinner about 12 o'clock. I went over first to Ellis street, crossing where I usually cross to my home, and I stood there for quite a while. I went to the third crossing in order to get over there. I had to walk across by the tank. It was pretty near a quarter to 1 o'clock before I got to dinner. It took me three-quarters of an hour to get across. The train held those crossings for three-quarters of an hour. The only means of crossing the tracks there on these three crossings was to get over the cars. If I didn't go over the cars I would have had to walk above the water tank, three crossings and probably two blocks farther. At the crossing where the boy was hurt you couldn't cross at all, unless you went over the train or under it, and one would have to go around the train about six blocks either way if one went north or south. The last time I saw that train upon that track blocking that crossing was at 1:30 o'clock. * * * Plaintiff was 8 years old at the time of the accident. He had been going to school two years and a half." The plaintiff himself testified: "I was waiting there (at the crossing) about half an hour, and the brakeman came along and I asked him how long before the train would be going. He said it would be 30 minutes. * * * When I first saw that brakeman, I was by that first crossing

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towards the north, the one where I was hurt. We were right by the train when I asked the brakeman when the train would move. He was walking down by the train, and when he went past me I asked him, 'Brakey, how long before the train will be going?' and he said '30 minutes.' Earl Rogers, Keeny Donell, Frank Dekay, and my older brother Charlie were with me. Charlie and the other boys was about two heads taller than myself. We were all there together when I spoke to the brakeman. My brother went over the top of the train. The brakeman went on up. When I asked him he said I had time if I wanted to. It was at the time my brother went over the train that the brakeman told me I had time to go if I wanted to. After the brakeman told me that I went over the couple. He said I had time. I went over what pulls the cars together so that the engine can pull them. The train gave a jerk, and I fell across the track. We saw men and other boys doing it, so we thought we could. After the brakeman said that to us I saw 10 or 15 other people doing it. I saw 10 or 11 boys and men both going over ahead of me. I was going over to get some money so I could go to the show—to get a quarter from papa so I could go to the show that day. The show was on the other side of the track. It had not started yet. The brakeman said it would be 30 minutes before the train would go, and that I would have time. I and the other boys with me had waited there half an hour before we saw the brakeman and asked him that. There was two main tracks to get across. We was waiting there for half an hour for Mackay train to get loose. I though when it left or separated we was all through. I didn't tell the brakeman I was going to climb under the cars. We just asked him if we had time to get over there. He said: 'You have 30 minutes. I suppose you have time.' My brother climbed the side ladder and went over the top, and then I started over the couplings. My foot was caught by the wheels when I fell. I asked the brakeman because I wanted to know how long it was going to stay there before I attempted to go over. After the brakeman told me that the train wouldn't move for half an hour I didn't hear any warning, any bell ring, or any whistle blow. If I had heard a signal, the whistle, or bell, I would know what is meant. When I went to go through that train I looked to see whether an engine was attached and I didn't see any. I looked both sides to see whether an engine was attached to that train or not, and I didn't see any engine at all." Charles Gesas testified: "We had been waiting at the crossing for about half an hour. We wanted to go across there. He [the plaintiff] asked the brakeman how long before the train would move, and the brakeman said 30 minutes. My brother [the plaintiff] crawled over the couple. The couple gave a jerk and threw him down and cut his foot off. I crossed over

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the cars before he was run over. I never crossed between the couple. I did not attempt to cross over that car before the brakeman told my brother that. Other persons were crossing there, passing through between the train before I started to go over. There were men and children crossing. Ten or eleven crossed under the couples. Some crossed over where Jesse crossed over the bumpers. Others crossed on different cars over different couplings. We had been there about 20 or 25 minutes when the brakeman came along. There were two trains standing on these tracks. He was caught in the St. Anthony mixed train that was on the west track. The other train had uncoupled right there. We walked through. The engine had gone a ways. Then we got in there, and was waiting for the other one to get out, and the brakeman came walking down between them. Then we couldn't get out or in. The brakeman was between the trains when we spoke to him. The people were climbing over both of them until the one opened, and as soon as the other one opened they went through until it closed up. As soon as it closed up they had to go over them again." Earl Rogers testified: "There was a whole lot more boys around there, but me and Charlie and them three stood together. I saw a brakeman there. Jesse asked him how long before the train would go, and he said it would be half an hour before it would move. Charlie went over the cars. Jesse tried to go through the couplings and it bumped and knocked him down. I saw the wheel pass over his leg. After the first train parted and let us through there we waited a little while close to the other train as we could get. Boys were going right through where Jesse did, and up above; also some men." A Mr. Hilliard testified that for 14 or 15 years he had been acquainted with the tracks and the depot at Blackfoot, and was familiar with the running of the trains; that when a train came in the conductor ordinarily got off the caboose when it was in motion and went to the operator, got his orders, and then proceed to the warehouse to unload; that after the train came to a stop at Blackfoot signals were given before it was moved, and that the signals would be given either by the head brakeman, the rear brakeman, or the conductor. The foregoing is a substantial statement of the evidence, except the testimony of plaintiff relating to his knowledge of the danger, which will be referred to later.

The defendant's motion was based upon the grounds that the evidence was insufficient to show negligence on the part of the defendant, and that the evidence showed contributory negligence upon plaintiff's part. After the motion had been argued, the court, in reviewing the evidence, among other things, observed that it had not been sufficiently shown that the injury occurred on a crossing, or that the train was moved without ringing the

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bell or blowing the whistle, and, for these reasons, intimated that the evidence was insufficient to show negligence upon the part of the defendant, and that in such view of the case it was not necessary to pass on the question of contributory negligence. Thereupon counsel for plaintiff stated: "In view of what your honor said about the evidence being somewhat obscure as to whether this accident happened on a crossing or not—

The Court: A little later I assume that I will treat it as though it did occur on a crossing. Counsel for Plaintiff: In view of what your honor said about the testimony of the plaintiff not being plain that a bell did not ring, we would like to call the other boys to prove that it did not. The court: I suppose they would swear they did not hear it, and the court, under those circumstances, would not submit it to a jury. That is one of the points that testimony is always in conflict. People standing around always swear they did not hear it, and railroad people swear they did. If that is all there is to it, even assuming the boys all swear they did not hear the bell ring— Counsel for Plaintiff: (Interrupting.) The Court: I do not think it is necessary to argue it any further. Counsel for Plaintiff: I do not want to argue it. I simply want to ask your honor to allow me to call Charlie Gesas and Earl Rogers to testify whether or not the bell rang or the whistle blew. And I offer to prove by Charlie Gesas and Earl Rogers that the bell did not ring and the whistle did not blow." Thereupon defendant's counsel objected on the grounds that the offer came too late, and that the testimony offered was irrelevant and immaterial, and would not change the situation. The Court: "If there were any real reason to suppose it would throw any additional light upon it, the mere fact that the application comes too late would not be refused, but the witnesses could not testify that the bell did not ring because it was manifest, standing between two trains, they could not see the bell. They might testify they did not hear it. The court will give you the benefit of that as though it were in evidence, and the application is refused." The motion for nonsuit was thereupon granted.

When the plaintiff rested his case, the only evidence that the train had moved without warning was the plaintiff's testimony that after the brakeman told him that the train would not move for half an hour, and before he attempted to go through, he did not hear the bell ring nor the whistle blow, nor anything to give warning that the train was going to start. We need not consider the question whether this evidence was sufficient to have carried the case to the jury on this point, for the court, after the attention of plaintiff's counsel was called to a want of evidence in this regard, ought to have granted plaintiff's request to supply it. It is well settled in this jurisdiction that a party making a motion

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for nonsuit is required to "specifically state the grounds upon which the motion is based, and thereby call the attention of the court and opposing counsel to the point on which he relies." *Frank v. Bullion Beck, etc.*, Min. Co., 19 Utah, 35, 56 Pac. 419; *Skeen v. O. S. L. R. Co.*, 22 Utah, 413, 62 Pac. 1020. As stated in the foregoing authorities, the purpose of requiring such specifications is to apprise the plaintiff of the particulars wherein it is claimed his proof is deficient, so that he may supply it if he is able to do so and prevent the expense and necessity of a retrial of the case. If the plaintiff is not afforded such opportunity, upon the making of an offer such as here, occasioning no unreasonable delay in, nor interfering with, the progress of the trial, the rule requiring specifications of particulars upon which the motion is based is, in part, rendered useless. The court, however, did not refuse the proffered evidence because it came too late, but on the assumption that the witnesses by whom it was offered to show the fact did not possess sufficient knowledge to testify to it, because, standing between the two trains at the time in question, they could not see the bell, and hence could only testify that they did not hear it. To such extent the court treated the proffered testimony as in evidence; but, assuming that the fact is always in conflict, and that people standing around always swear they did not hear it and railroad people swear they did, he would not, under such circumstances, submit the question to the jury. We do not think, however, the court meant to say that the offer was denied, nor that he declined to submit the question to the jury, because the fact offered to be proved was generally in conflict, nor that it would likely be denied by witnesses for the defendant, nor that one did not possess sufficient knowledge to testify concerning it unless he saw the bell, nor that the court meant just what his language fairly imports. We think all the court meant by the observations was that, in view of the surroundings of the witnesses, their situation at the time, and of their lack of attention, it was not probable that they would have heard a bell had it rung, particularly not the bell of the train in question. And the negative testimony of the witnesses that they, under the circumstances which had already been disclosed to the court did not hear it, would not be sufficient evidence that it did not ring, especially when, as is generally the case, there is some positive testimony that the bell did ring. Undoubtedly there may be a variety of cases where the circumstances are such that the court may conclusively assume that if the bell had rung the witness would not have heard it and his testimony that he did not hear it would not be sufficient evidence to prove the fact that it did not ring. But this was not such a case. Here the means and opportunity of hearing and knowing the fact by the witnesses had been sufficiently shown, especially by the older boy who at

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the time of the accident had just climbed or was climbing over the top of the car. If not, the plaintiff had the right to show their means of knowledge. That they were boys, 9 and 12 years of age, who had been standing between the trains, and were climbing over the cars on their way to carry placards in the parade, did not authorize the court to conclusively assume that they had no such means or opportunity, or that there was such a want of attention on their part as to prevent their hearing the bell had it rung. The remarks of the court were more pertinent to the weight of the testimony than to its competency. *Haun v. R. G. W. Ry. Co.*, 22 Utah, 346, 62 Pac. 908. Furthermore, the plaintiff's offer was not that the witnesses would merely testify that they did not hear the bell, but "that the bell did not ring and the whistle did not blow." The court ought either to have assumed the fact in evidence as offered, or to have given the plaintiff an opportunity to so prove it. The court did neither. We will therefore review the ruling granting the motion for nonsuit from the standpoint that the train was put in motion without warning.

It is in effect urged by the respondent that no duty of giving warning before moving the train was imposed upon it, and hence it was not negligent in failing to do so. This claim is made on the grounds that the requirement to give warnings and signals applies only to cases where the train is approaching crossings, or is being operated along or across streets of a town or city; that the duty is owing only to those who are ahead of the engine or train; and that the plaintiff was a trespasser to whom the defendant owed no duty until he was discovered in a place of danger. We think neither of the positions tenable. Because the duty to give signals at crossings and when trains are being run through towns or cities is generally imposed by statute or ordinance, it does not follow that such duty is alone confined to such cases, or that it exists merely because its performance is required by statute or ordinance. It may well exist independent of any statute or ordinance, when measured by the standard of ordinary care and prudence. The rule of law which requires railroad companies to use reasonable and ordinary care in the operation and handling of their trains and cars so as not to injure others is not confined alone to crossings. It applies to all cases where, from all the circumstances surrounding the case, care and prudence are required of them, and where the failure to exercise it may result in injury to others. Railroad companies, like natural persons, must so use their own property and privileges as not to injure the rights of others, and in running and operating their cars they must exercise care proportioned to the danger of injury to others. When in the exercise of such care ordinary caution and prudence require the giving of signals or warning, the failure

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to do so is negligence. In the case in hand it is made to appear: That the crossings had been blocked by the defendant for about one hour. That many persons of the town had been attracted by some kind of a show or a parade about to take place. Some of them were about the street at the crossings and near the track where the cars stood. A number of them had crossed between the cars and over them. It is but fair to presume that the train operatives well knew these things, or that they, in the exercise of ordinary care, ought to have known them. Moreover, there is evidence in the record that men and boys, in the presence of the brakeman, passed between and over the cars. It was well observed by Mr. Justice Holmes in the case of *Schlemmer v. Buffalo, Rochester, etc., Ry.*, 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681: "Negligence consists in conduct which common experience or the special knowledge of the actor shows to be so likely to produce the result complained of, under the circumstances known to the actor, that he is held answerable for that result, although it was not certain, intended, or foreseen." Aside from the knowledge possessed by the brakeman that the plaintiff and his companions and others, were about the cars, a jury may well find from all the circumstances that the train operatives, in the exercise of ordinary care, ought to have anticipated that persons might be in the act of crossing, or be on or between or about the cars, and that not to give warning before moving the train would result in injury. In a case where the facts were quite similar to those before us, where a boy 8½ years of age "attempted to climb between the cars for the purpose of going to his home and the train started and killed him," it was said: "Whatever may be the law in other jurisdictions, it is very well settled in this state that trains cannot be operated in such places in the same manner that they may be lawfully operated in the country. Such a state of facts calls for the exercise of some additional care in the movement of trains. The care to be exercised is undoubtedly that degree of care which is reasonably adequate to meet and avoid the dangers which ought to be anticipated under the circumstances. *Townley v. Railway Co.*, 53 Wis. 626, 11 N. W. 55; *Whalen v. Railway Co.*, 75 Wis. 654, 44 N. W. 849; *Johnson v. Transfer Co.*, 86 Wis. 64, 56 N. W. 161. It was clearly a question for the jury in the present case to decide whether the trainmen ought, in the exercise of due care, to have anticipated that a child might be present on the track or on the cars when the train started, and, if so, whether some greater degree of care should have been exercised in giving warning of the starting of the train, or some greater precaution taken to guard against such an accident. The train had stood in that place for nearly an hour, blocking all the communication between the two sides of the village. The proof was ample to

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show that grown persons and children frequently crawled under or climbed over trains at that place under like circumstances. Upon this very day the conductor of the train saw children playing between the tracks and attempting to ride on the cars of his train when it pulled in. The question whether he and his colleagues in the management of the train exercised that degree of care when the train pulled out which ought to have been exercised, in view of the danger to be reasonably anticipated, was a question for the jury." *Carmer v. Chicago, St. P., M. & O. Ry. Co.*, 95 Wis. 513, 70 N. W. 560. Nor did the defendant's negligence in moving the train depend upon notice to the employees that the particular person injured was between or on the cars, or that his position was one of peril when the train was moved, where the crossings had been obstructed for an hour or more and many persons had passed between or over the cars, to the knowledge of the defendant's employees. *San Antonio & A. P. Ry. Co. v. Green*, 49 S. W. 670, 20 Tex. Civ. App. 5. The plaintiff was not a trespasser, and therefore the contention made that no duty was owing from the defendant until he was discovered in a place of danger is not sound. The evidence tends to show that the plaintiff was rightfully upon the crossing. He was at a place where he had a right to be. His right to the use of the crossing was in most respects mutual, reciprocal, and equal with that of the defendant, except as to the right of way of passage. He had remained at the crossing about half an hour, waiting for the removal of the obstruction. His climbing upon the cars, under the circumstances, for the purpose of crossing and passing over the obstruction, did not make him a trespasser. *Littlejohn v. Richmond & D. R. Co.*, 49 S. C. 12, 26 S. E. 967; *Mayer v. C. & A. R. R. Co.*, 63 Ill. App. 309; *Krenzer v. Pittsburgh, C., C. & St. L. Ry. Co.*, 151 Ind. 587, 43 N. E. 649, 68 Am. St. Rep. 252. We think the evidence sufficient on the question of the defendant's negligence to let the case to the jury.

We now come to a consideration of the question of contributory negligence. Even an adult may or may not be guilty of negligence, depending upon the circumstances of the case, in climbing over stationary cars obstructing a crossing. In some cases he may be guilty of negligence as matter of law; in others, it is a question of fact for the jury. This is well illustrated in the following cases: *Corcoran v. St. Louis, I. M. & S. Ry. Co.*, 105 Mo. 399, 16 S. W. 411, 24 Am. St. Rep. 394; *Sheridan v. B. & O. R. Co.*, 101 Md. 50, 60 Atl. 280. In the first case the plaintiff was held guilty of negligence as matter of law, where it appeared he attempted to climb over stationary cars without looking to see or knowing whether they were attached to an engine, or were liable to be moved at any time, although the cars were obstructing the street crossing in violation of the city ordinance. In the other case the plaintiff, on his way to dinner, in approach-

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ing the crossing, found it blocked by a long freight train. He met a brakeman of the train, who told him to jump over it, but he crawled underneath the cars and crossed in that way. On his return from dinner, going towards the factory where he was employed, he found the train still standing across the street. He met the same brakeman, who again told him to cross the train. The plaintiff hesitated to do so, when the brakeman told him he had plenty of time, and further stated: "We cannot leave here until we get a helper, and probably we will be here an hour," and said that a signal had to be given the engine ahead before starting the train. The plaintiff thereupon took hold of two cars and attempted to get upon the bumpers between them, so as to cross over the train, but just as he got his foot on the bumpers, the train started without signal or warning, and crushed his foot between the bumpers. In holding that the plaintiff was not guilty of negligence, the court said: "The appellant does not appear to have attempted to make the crossing in a negligent manner. To cross over the bumpers between two freight cars when at rest is not necessarily a dangerous operation. The peril of the situation arises from the danger of the cars starting before the crossing is completed. In the present case the appellant used reasonable care to ascertain when the train would start by making inquiry of one of the brakemen in charge of it, who informed him that it would remain for some time longer until a helping engine came, which would signal its approach by blowing a whistle. Assuming that the appellant had the implied assent of the appellee to make this crossing, we do not think it can be said as a matter of law that he was guilty of contributory negligence in attempting to make it in the manner appearing from the evidence."

The case is somewhat stronger in its facts than is the one in hand in the particulars that the plaintiff was there informed that a signal would be given before the train would be moved, and was invited by the brakeman to cross, while here the brakeman told the plaintiff he would have time to cross if he wanted to. But it must be remembered that the conduct of a boy 8 years of age is not to be judged by the standard applied to an adult. It may well be that the statement made to the boy, if it did not amount to an implied invitation to cross, nevertheless was so understood by him. Though the statement was not an invitation to cross, and though the boy was not justified in accepting it as such, nevertheless it well tended to induce or at least influence him in believing that the cars would not be moved for some time, and that the crossing could be made by him in safety, especially when considered in connection with the other circumstance that he saw others doing so with apparent ease and in safety. The degree of care required of a child must be graduated to its age, capacity, and experience, and must be measured by what might

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ordinarily be expected from a child of like age, capacity, and experience under similar conditions. If it acted as might reasonably be expected of such a child, it cannot be charged with contributory negligence. It, however, is urged that, notwithstanding plaintiff's age, he had sufficient capacity to know and understand the character of his act and the risks incident thereto, and for that reason his conduct was to be measured by the same standard as is applied to an adult. This is principally based upon the following testimony given by plaintiff on cross-examination: "Q. You knew when you started to cross if the train was standing there it was likely to go most any time? A. I thought— When the Mackay train left, we thought we was all through. Q. When it separated—you didn't know the other train was there until it separated? A. No; we was waiting there for half an hour. Q. You don't know how long the other train had been there, and when it came there? A. No; the Mackay train was there half an hour. Q. Of course you knew that when a train is standing on the track it is likely to move at any time. You never know when it is going to move? A. No. That is right. Q. You knew that you were taking chances when you undertook to crawl under or over the train, didn't you? A. Yes. Q. You knew—A. I didn't think nothing at the time. Q. I understand. But when you stop to think about it you knew then and do now that it was a dangerous thing to go under or over a train because you don't know when it might start? A. I didn't think of it at all when I done it. Q. If you had stopped to think you would have known it would be dangerous? A. Yes. I think it now after it is already done. Q. You knew that the couplers that were there were not made to stand on, walk across the train on, didn't you? A. I saw so many people do it. Q. But you knew that was not what it was provided for? A. I know it. I know it was provided just to pull the train along. Q. It was not for people to ride or stand on, or anything of the kind? A. No. * * * Q. And you knew if it did move and you were under it or on it somewhere it might shake you off and run over you? A. Yes; I didn't think of that at the time though. Q. You didn't stop to think, did you? A. No. Q. You thought you would get across before it would start? A. Yes, sir; the brakeman told me I would have time. Q. You knew that if it was likely to start you wouldn't have started to go through there if it was going to start? A. No, sir. Q. And you wouldn't have done that because you knew it would be dangerous? A. I know I wouldn't. Wouldn't take chances on my life like that if I knew it was going to go. Q. It was because you thought it was not going to go that made you climb through there? A. Yes. Q. If you thought it was going to go you wouldn't have risked your life, as you say, by going through there? A. This brakeman ought to

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give me a kick and sent me away from there, knocked me out of there. That is the way I think of it now." This testimony shows that the boy possessed some knowledge that danger was involved in an act of climbing over cars if they were set in motion. But it also shows, especially when read with his testimony on direct examination, that he, from what the brakeman told him, did not anticipate that the cars might be moved. The danger to which he was exposed arose from the starting of the train. The happening of the thing which made his undertaking dangerous was not expected by him. He thought there was no danger because he did not expect the train to move. So thinking and so believing he acted. Is he to be charged with negligence as matter of law because he did not think otherwise, and did not anticipate that the cars might be moved, notwithstanding what the brakeman told him, the length of time the cars had stood blocking the crossing, and what he saw others doing? We think not. Furthermore, the testimony does not so clearly show that he at the time fully appreciated the danger to which he was exposed, or that he had such thoughtfulness or discretion to avoid it which is possessed by an ordinarily prudent adult person as to require his conduct to be measured by such a standard. The respondent's contention in this regard is well answered by the court in the case of *Thompson v. M., K. & T. Ry. Co.*, 93 Mo. App. 548, 67 S. W. 693, in the following language: "Suppose the fact to be conceded that the plaintiff had sufficient mental capacity to know that it was dangerous to undertake to pass between the cars of defendant's train while it was standing on its track at said station, and that notwithstanding this knowledge of the danger he attempted to pass between such cars and was thereby hurt, is that of itself sufficient to charge him with contributory negligence? A boy may have the knowledge of an adult person in respect to the danger which will attend a particular act, but at the same time he may not have the prudence, thoughtfulness, and discretion to avoid them which is possessed by the ordinarily prudent adult person, and therefore it has become a settled rule of law in this state that a child is not negligent if he exercise that degree of care which, under like circumstances, would be expected of one of his years and capacity. And whether he uses such care in any given case is a question to be left for the jury to decide. *Anderson v. Railroad*, 81 Mo. App. 116; *Riley v. Railroad*, 68 Mo. App. 652; *Burger v. Railroad*, 112 Mo. 249, 20 S. W. 439, 34 Am. St. Rep. 379; *Anderson v. Railroad*, 161 Mo. 411, 61 S. W. 874. The defendant's instructions, as have been seen, told the jury that if it found the fact to be that the plaintiff had sufficient mental capacity to know the danger attending an attempt to pass between the cars, and with this knowledge made such an attempt and was thereby injured, he was guilty of con-

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tributory negligence, without reference as to whether or not he had the prudence, thoughtfulness, and discretion to avoid it (the danger) which is possessed by an ordinarily prudent adult person."

While a child 8 years of age may, in some cases, be guilty of negligence as matter of law, the question is generally one of fact for the jury. 1 Thompson's Commentaries on the Law of Negligence, § 308; 3 Elliott on Railroads, § 1261. We are of the opinion that, under the facts and circumstances of this case, the question here was one of fact.

The judgment of the court below is therefore reversed, and the cause remanded for a new trial. Costs to appellant.

MCCARTY, C. J., and FRICK, J., concur.

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(Supreme Court of Michigan, Dec. 30, 1907.)

[114 N. W. Rep. 338.]

Evidence—Opinion Evidence—Competency.*—The fact that a witness was a passenger on an electric car did not render him incompetent to testify as to its speed.

Trial—Request to Charge—Refusal.—Requests to charge which were not correct or were covered by further instructions given were properly refused.

Death—Action—Instructions.—The court charged that expectancy tables showed defendant's expectancy at the time of death to be 38 years, and that of his wife 39 years; that the tables were not controlling, and that the uncertainty of life as applied to deceased, the widow and child must be considered, but should not be exceeded, nor should damages be allowed on account of the child after he became of age; that, as the widow and child were both alive at the time of the trial, the period from the date of the accident to the date of the charge should be treated as a certainty in the computation; and that, as to the future of the widow, child, and deceased, the matter was an expectancy, which must be reduced to their present worth in rendition of a verdict. Held, that the charge as an entirety was not misleading as authorizing double damages for the same period.

*For the authorities in this series on the question, what evidence is admissible to show the rate of speed of a train or car, see foot-notes appended to Mathiesen v. Omaha St. Ry. Co. (Neb.), 11 R. R. R. 777, 34 Am. & Eng. R. Cas., N. S., 777; second foot-notes appended to Coffey v. Omaha, etc., Ry. Co. (Neb.), 25 R. R. R. 599, 48 Am. & Eng. R. Cas., N. S., 599.

Goodes v. Lansing & Suburban Traction Co

Error to Circuit Court. Genesee County; Charles H. Wisner, Judge.

Action by Frank W. Goodes, as administrator of the estate of George W. Burton, deceased, against the Lansing & Suburban Traction Company. From a judgment for plaintiff, defendant brings error. Affirmed.

Argued before MCALVAY, C. J., and CARPENTER, OSTRANDER, HOOKER, and MOORE, JJ.

Moore, Brown, Miller & Ladd, for appellant.
Lyon & Moinet, for appellee.

MOORE, J. This is an action brought by the administrator of the estate of George W. Burton, deceased. Plaintiff's decedent, George W. Burton, took defendant's train in the city of Lansing on August 20, 1905, for the city of St. Johns. The train consisted of an electric motor car and trailer. The motor car was a closed car, having trucks at both ends. The trailer an open car, with a single truck under it, without any means of propelling itself. Mr. Burton was in the trailer car, which when on a downgrade and at a curve left the track. Mr. Burton was thrown from the car, and received injuries which in the course of a few hours proved to be fatal. He left a widow and one child. From a judgment in favor of the plaintiff, the case is brought here by writ of error.

The first group of assignments of error calling for discussion relate to the testimony of several witnesses as to the speed of the train. It is claimed it was not shown the witnesses were qualified to express an opinion, and, also, that it was not competent to receive the opinion of a witness who was a passenger in an electric car as to its speed. The testimony was properly received under *Mertz v. Railway*, 125 Mich. 11, 83 N. W. 1036, and the cases there cited, and *Garran v. Railroad Co.*, 144 Mich. 26, 107 N. W. 284.

Error is assigned upon the refusal to give certain of defendant's requests to charge. Certain of defendant's requests were given. Those not given were either not correct statements of the law or were fully covered by the general charge of the court.

Error is assigned upon the charge as given. Counsel say "the charge is clearly prejudicial, as, under the charge of the learned circuit judge, the defendant is charged with damages twice, covering the same period, and that the charge is so ambiguous and uncertain that the jury would not have been able to compute the amount of damages with any degree of certainty." Before we can decide this contention intelligently, we should consider the material parts of the charge bearing upon that subject which in part are as follows: Requests presented by defendant: "In

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determining amount of damages the plaintiff shall recover, if any, I instruct you that you shall take into consideration the uncertainty of life, as well as the expectancy of life as shown by the mortality tables introduced in evidence by the plaintiff in this case, as applied to the life of the deceased and the surviving widow and child. * * * The fifth one I give you. I instruct you that the damages that can be recovered by plaintiff in this case, if any, cannot exceed the expectancy of the life of the deceased, George W. Burton. * * * And the tenth I give you as follows: If, in your deliberations, you come to the question of damages, I instruct you that in making your computation as to what amount of damages plaintiff is entitled to recover you shall take into consideration, not only what the deceased was earning at the time of his death, and his prospects for his increasing his earnings, but shall also consider the likelihood of the earnings of the deceased becoming less during the latter years of his life had he lived, and also any period of the time that his earnings might have ceased due to sickness or other causes, if any. I will add that in your judgment in any way would lessen his ability or his desire to contribute to his family." In his general charge: "If you find for the plaintiff, you must give only such sum as will fairly and reasonably compensate the widow and child for their loss, or such sums of money as you may find the husband and father would have contributed to them during the minority of the child and the life of the widow. * * * But, if you find this railway company is liable to the administrator of that estate for the death of Mr. Burton, then you will first ascertain what sum Mr. Burton was contributing to his wife and child per year, and, if you find that such contribution would naturally and surely increase in the future, you will take that into consideration. * * * Now, when you have ascertained the amount that he was contributing and would contribute up to this date, you will set that sum aside, because whatever sum he was paying and contributing he would pay and contribute up to this time is due and payable now, and nothing can be deducted from it, so you will set that sum aside. Now, you will remember he died on the 20th of August, 1905. You must find the amount his contribution would be to the widow and child from that date up to the 10th day of January, 1907. You will set that sum aside, and let it constitute a sum by itself. Then you will determine the expectancy of life of the child; for instance, you will determine whether, in your judgment, the child from the evidence in the case and from the appearance of the child itself as you have seen it here about the courtroom whether in your judgment the child will live to be 21 years of age, and whatever time you will determine, you do determine the child will live, why, you will fix that as his expectancy of life. You will then consider the ex-

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pectancy of the life of the widow and the expectancy of the life of the husband and father, and, if you find that the expectancy of the life of the widow is less than you should find that the expectancy of the life of the husband is, then you will base your calculation on the expectancy of the life of the widow. In any event, it must not exceed what you find to be the expectancy of the life of the husband, because the tables that are offered in evidence here show the expectancy of the wife to be 39 years and the expectancy of the husband to be 38 years, but you cannot go beyond the life of the husband. If you find that the expectancy of the widow is less than his expectancy, then you must use her expectancy in the calculation that you make. * * * Now, having done that, having fixed those various expectancies, you will determine the amount of contribution, and add it as payable in advance now for all the time that you shall fix it must be determined on the principal of annuities you must give such a sum as from year to year put at interest at 5 per cent. would give to whole sum that you find, so you will make the sum of the contribution as you find it to be, and for the first year of the expectancy you will divide it by 1.05, and the sum that you get by that division you will set one side and keep it one side, right under the sum that you have already set aside for the sum that is due up to this date. You will then take the second year, using the same sum that you have fixed only divide that sum by 1.10, and set that sum in the column that I have mentioned. The third year you will divide that sum by 1.15, and set that sum aside and figure in that way up to 21, until you find the child will become 21 years of age. Now, up to that point you will use the entire sum of what you find to the contribution, but when you reach that point then in my judgment you must separate and you must stop the contribution to the child, and from that time on use the sum you find the contribution would be to the wife, having deduced that sum that would go to the child and then continue with that figuring on until you have reached the full expectancy of the life of the widow, using, as I say, an additional five for every year as you would go along, and carrying these sums out after you have made that computation, then add up all those sums that you have carried one side, and that would be the amount of your verdict." We must assume the jurors were intelligent men, and that they considered the entire charge. The effect of the charge was to say to the jury that the tables when Mr. Burton died showed his expectancy of life to be 38 years, and of his wife to be 39 years, but that they were not controlling, and that the uncertainty of life as applied to the deceased, the widow, and the child must also be considered; that, as to the widow, her expectancy of life must not be exceeded, nor must the expectancy of the deceased be exceeded; that, as to the

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child, his expectancy must not be exceeded, nor must the expectancy of his father be exceeded, nor could damages be allowed on his account after he became 21 years of age; that as to the widow and child, as they were both alive at the time of the trial, the period of time from August 20, 1905, when the accident occurred to the date of the charge January 10, 1907, was no longer an expectancy, but was a certainty, and must be so treated in the computation; that as to the future of the widow, child, and deceased the matter was an expectancy, and, as the judgment was for a sum then due, these expectancies must be reduced to their present worth. See *Rouse v. Railway Co.*, 128 Mich. 155, 87 N. W. 68. When the charge is read as an entirety, we do not think it can be said to have misled the jury.

The other assignments of error do not call for discussion.

Judgment is affirmed.

BUTLER v. RHODE ISLAND CO.

(Supreme Court of Rhode Island, Dec. 13, 1907. On Rehearing, Dec. 17, 1907.)

[68 Atl. Rep. 425.]

Pleading—Declaration—Amendment—No New Cause for Action—

In an action for a collision between defendant's car and plaintiff's carriage, caused by the careless driving at an excessive speed of defendant's car, an amendment of the declaration, showing a difference in the description of plaintiff's position and the direction in which her carriage was proceeding, did not state a new cause of action.

Depositions—Sick Witness—Court's Discretion.—Under Court and Practice Act 1905, § 383, authorizing the taking of depositions during trials on order of the trial judge, the granting or refusal of an order for the taking of a deposition of a witness alleged to be detained from the court by sickness is within the trial judge's discretion.

On Motion for Reargument.

Street Railroads—Injuries to Persons Crossing Track—Liability.*

—A street railway company is liable for injuries to one struck by its

*For the authorities in this series on the question whether the speed of a car or train is negligent, because in violation of an ordinance, see foot-notes appended to *Mathiesen v. Omaha St. Ry. Co.* (Neb.), 11 R. R. R. 777, 34 Am. & Eng. R. Cas., N. S., 777, where all the preceding ones are collected; foot-notes appended to *Beier v. St. Louis Transit Co.* (Mo.), 22 R. R. R. 281, 45 Am. & Eng. R. Cas., N. S., 281.

For the authorities in this series on the question of proximate

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car, where, when she drove upon the track, the car was not dangerously near, and when she and her driver discovered it, it was far enough away to have been avoided by turning off the track to the left if it had been coming within the speed allowed by ordinance, it appearing that plaintiff could only avoid the car by turning off the track to the left.

Appeal—Decisions Reviewable—Nonsuit—Exceptions.—No exception lies to the refusal of a nonsuit.

Appeal—Review—Harmless Error—Disregard of Erroneous Instructions.—That the jury disregarded an erroneous instruction is not ground for a new trial, if they found the verdict justified by the evidence.

Exceptions from Superior Court, Providence County.

Action by Julia Butler against the Rhode Island Company for personal injuries. From a verdict for plaintiff, defendant brings exceptions. Exceptions overruled, and cause remanded for judgment. Motion for leave to file a petition for reargument denied.

Argued before DOUGLAS, C. J., and DUBOIS, JOHNSON, and PARKHURST, JJ.

Irving Champlin and Patrick J. McCarthy, for plaintiff.

Henry W. Hayes, for defendant.

PER CURIAM. The exceptions of the defendant have no merit, and only two of them deserve mention. After the first trial, and more than two years after the action accrued, an amendment to the declaration was allowed, which the defendant contends made a new case. A comparison of the original count and the bill of particulars filed under it with the amended count, as allowed to be filed, shows a difference in the description of the plaintiff's position and the direction in which her carriage was proceeding. It cannot in any sense be considered as a statement of a different case. The cause of action in both declarations was the collision between the defendant's car and the plaintiff's buggy, caused, as alleged in both, by the careless driving, at an excessive speed, of the defendant's car. Under the facts as proved at this trial, the plaintiff could have recovered under the first declaration. The second only added further particulars without changing the main allegation. Towards the close of the trial the defendant asked an order from the court to take the deposition of a witness (section 383, Court and Practice Act 1905), who, it was alleged,

cause where the person injured by a train or car, while crossing track, was negligent in going upon track and the train or street car was being operated at an unlawful or negligent speed, see foot-notes appended to *Thomas v. Central of Georgia Ry. Co. (Ga.)*, 18 R. R. R. 191, 41 Am. & Eng. R. Cas., N. S. 191; foot-notes appended to *Schwartz v. Delaware, etc., R. Co. (Pa.)*, 25 R. R. R. 10, 48 Am. & Eng. R. Cas., N. S., 10.

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was detained from court by sickness. The granting or refusal of such an order is within the discretion of the trial judge.

We do not find any abuse of discretion in the circumstances shown by the record. The evidence, in our opinion, fairly supports the verdict of the jury both upon the merits of the case and in the amount of damages.

The defendant's exceptions are overruled, and the cause is remanded to the superior court for judgment on the verdict.

On Rehearing.

The defendant asks for a reargument on the supposition that the court did not consider sufficiently the second point in the brief of counsel, involving the weight of the evidence. We found the evidence practically uncontradicted that the defendant's car was traveling at such a rate of speed as to constitute negligence. The evidence further showed that when the plaintiff drove over upon the track the car was not in dangerous proximity to her vehicle; that when she and her driver discovered the car it was still far enough away to have been avoided by turning off the track to the left, if it had been coming only at the speed allowed by the city ordinances. It appeared further that the plaintiff could only avoid the car by turning off the track to the left; and we found upon these facts that the fault causing the collision was wholly that of the defendant. If the plaintiff had been negligent in driving upon the track at first, such negligence was not the proximate cause of the collision, and cannot be considered contributory negligence.

The ruling of the presiding judge refusing to grant a nonsuit was not before us as no exception lies to such a refusal; but the whole of the evidence as bearing upon the allegations of the declaration was before us, and upon the weight of the evidence we found the verdict of the jury to be sustained. As we said in *Galligan v. Woonsocket S. R. Co.*, 27 R. I. 363, 365, 62 Atl. 376, 377: "The fact that the jury disregarded an erroneous instruction, provided they found a verdict which was justified by the evidence, furnishes no ground for a new trial."

The motion for leave to file a petition for reargument is denied.

STEVENSON *v.* PITTSBURG, C., C. & ST. L. RY. CO.

(Supreme Court of Pennsylvania, Jan. 6, 1908.)

[69 Atl. Rep. 45.]

Negligence — Dangerous Premises — Contributory Negligence.* — Where plaintiff, descending slippery steps to a railroad station, at first used the hand rail, but because his glove caught on some knobs on the rail he went down the middle of the steps, though he knew of their slippery condition and fell, he was guilty of contributory negligence, barring recovery.

Appeal from Court of Common Pleas, Allegheny County.

Action by William E. Stevenson against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. Judgment for defendant. Plaintiff appeals. Affirmed.

At the trial the court gave binding instructions for defendant, charging in part as follows: "The point that I think is a bar to the plaintiff's case is this: He admits that when he reached the top of this stairway he saw that it was very icy. He recognized the danger, and on account of that danger took hold of the railing. The photographs in this case show a railing. According to the testimony it was up away from the step nine inches, the amount of projection of the cement wall. It was easily reached, and was put there for the purpose of protecting people from falling from the steps, and also a band rail. The plaintiff recognized that and took hold of it. He gives no good excuse why he let go of it—why he did not continue to protect himself by that rail. He stepped to the middle, and walked down until he was within four or five steps of the first landing, when the very thing happened to him which he feared, and which he had every reason to expect. In that he was, to my mind, plainly guilty of negligence. The only excuse he gives was that he could not continue to hold the rail on account of the spikes, which he said projected half an inch above the rail. They are shown on these various pictures, and shown to be far enough apart to take hold; but he does not say that there was anything dangerous about them—simply that they caught his glove. He

*For the authorities in this series on the subjects of contributory negligence of and assumption of risks by a person, other than a railroad employee, in voluntarily exposing himself to a known danger, see foot-notes appended to *Holmes v. Chicago, etc., Ry. Co.* (Neb.), 18 R. R. R. 485, 41 Am. & Eng. R. Cas., N. S., 485, where all those preceding it are collected or referred to; *Pegram v. Seaboard A. L. Ry.* (N. Car.), 22 R. R. R. 481, 45 Am. & Eng. R. Cas., N. S., 481.

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does not say they prevented him from taking hold, or even taking hold of the grillwork below the rail."

Verdict and judgment for defendant. Plaintiff appealed.

Argued before MITCHELL, C. J., and FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

David S. McCann, for appellant.

William S. Dalzell, for appellee.

PER CURIAM. The plaintiff, coming to the stairway leading to the station, found a hand rail plainly intended for the convenience and safety of persons descending. He recognized the purpose and the usefulness of the rail by taking hold of it at first; but then, finding his glove caught in some projecting points or knobs on the rail, he let go of it and took the middle of the steps, although he knew they were slippery with ice. Thus, to avoid what was, at most, an inconvenience, he voluntarily encountered a manifest danger. He thus took upon himself the risk.

Judgment affirmed.

ATTORNEY GENERAL *ex rel.* CITY OF MONROE *v.* TOLEDO & MONROE RY.

(Supreme Court of Michigan, March 17, 1908.)

[115 N. W. Rep. 422.]

Street Railroads—Franchise—Forfeitures—Grounds.*—The fact that a corporation, authorized by Comp. Laws, § 6234, par. 5, to construct its railroad on streets pursuant to the consent of the municipality, and possessing a franchise to operate a street railroad in a city pursuant to an ordinance imposing the conditions on which the railroad should be operated, carried freight not authorized, and charged excessive fares, and obstructed the streets of the city, was not a cause for the forfeiture of the franchise, but called for the regulation of the business done by the corporation.

Error to Circuit Court, Wayne County; Joseph W. Donovan, Judge.

Quo warranto by the Attorney General, on the relation of the

*See generally, second foot-note appended to *Wheeling, etc., R. Co. v. Triadelphia* (W. Va.), 20 R. R. R. 336, 43 Am. & Eng. R. Cas., N. S., 336, where all the authorities on the subject in this series preceding it are collected. *Millcreek Tp. v. Erie R. T. St. Ry. Co.* (Pa.), 24 R. R. R. 266, 47 Am. & Eng. R. Cas., N. S., 267.

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city of Monroe, against the Toledo & Monroe Railway and others. From a judgment for defendants, the relator appeals. Affirmed.

Agued before MCALVAY, C. J., and CARPENTER, GRANT, MONTGOMERY, and MOORE, JJ.

Willis Baldwin and *E. R. Gilday*, for appellant.

Charles A. Golden (*John C. Donnelly*, of counsel), for appellee.

MOORE, J. This is a quo warranto proceeding. Some information will be afforded in relation to the questions involved by a reference to the opinions in *Ilgenfritz v. Toledo & Monroe Railway*, 136 Mich. 634, 99 N. W. 878, and *City of Monroe v. Monroe Traction Company et al.*, 143 Mich. 315, 106 N. W. 704. By the writ of quo warranto the relator seeks to quash the charter of the Monroe Traction Company and to oust the other two defendants from taking, holding, or operating the street railway franchise granted by the city of Monroe to the Monroe Traction Company. The claim of the relator is summarized in the brief of counsel. It is claimed defendants have violated state law and policy. We quote: "(1) The Monroe Traction Company perpetrated a fraud upon the state and the people by its fictitious incorporation. (2) The Monroe Traction Company has been and is guilty of nonuser. These acts, being negative, cannot be reached by injunction. The general railroad companies have been guilty of the following violations of state law and policy: (1) They have taken, direct to themselves, a street railway franchise on Monroe and Anderson streets. (2) They have taken an assignment of a street railway franchise on Elm street. (3) They are operating a street railway system through the streets of Monroe. (4) They claim the right, and exercise it, of doing a general freight business through the streets of Monroe in operating a street railway. (5) They are charging fares which are excessive under their incorporation and the state law. The first three of these violations cannot be reached by injunction. This court has already decided that. The last two violations might be reached either by information, or by injunction, under the principles of the cases above cited."

Before determining whether the above contention is well founded, it will be necessary to learn more of the situation than is obtained by reading the opinions in the cases to which reference has heretofore been made. In September, 1899, the city of Monroe granted to Clarence A. Black and his associates, who were to organize a corporation, a street railway franchise, with the right to "construct, equip, maintain and operate a street railway for the conveyance of persons, property and merchandise (as far as this city has the right to grant such authority) with all the necessary and convenient tracks, sidetracks, switches, turn-

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table, turnouts, and connections, and to erect and maintain all arms, poles, wires and other equipment necessary to operate such railways during the period hereinafter provided, in, upon and through the following streets in the city of Monroe." The grant specified, among others, "along and through Monroe street, and across the bridge on the River Raisin to Anderson street, and through Anderson street to the northerly city limits. Mr. Black and his associates immediately organized the Toledo & Monroe Railway under the general railway act, and constructed and put the line in operation to Toledo. The power house was constructed at the intersection of Anderson and Elm avenue near the northerly end of the bridge. In 1900, a separate grant was made to Mr. Black and associates, to be organized into a corporation, with the right to construct a road on Elm avenue to its easterly terminus, and then on private right of way to the lake shore, to be connected with the road on Monroe and Anderson streets, so that through cars could be operated to the lake shore. Mr. Black and his associates organized the Monroe Traction Company under the tram railway act, for the purpose of constructing this Elm Street route. The connection was made, and through cars were put in operation; the Monroe Traction Company leasing its tracks to the lake shore to the Toledo & Monroe Railway. Subsequently the city of Monroe and the Toledo & Monroe Railway and the Monroe Traction Company got into a controversy as to the failure of the Toledo & Monroe Railway to build certain branch lines in the city of Monroe, and because thereof the city of Monroe attempted to and did formally pass an ordinance repealing the two ordinances above named. This controversy was settled, and as part of the settlement the common council of the city of Monroe on the 22d day of September, 1902, and, after the roads had been constructed and in operation for nearly two years, re-enacted both ordinances and regranted directly to the Toledo & Monroe Railway Company the rights on Monroe street, and Anderson street and the bridge, and to the Monroe Traction Company the rights upon Elm avenue, without any change whatever in the rights, powers, privileges, and franchises that had been granted in the original ordinances as to their extent and character, and still required the connection to be continued between the two lines and the operation of through cars. For these regrants the city received as part consideration the sum of \$5,000 in cash. The Detroit, Monroe & Toledo Short Line Railway Company afterwards acquired the rights of the other two defendants. The record discloses that the property owners whose land abuts upon the street have executed releases and have consented to the construction and operation of these lines on the streets of Monroe.

The general railway act, from which the Toledo & Monroe Railway Company and the Detroit, Monroe & Toledo Short Line

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Railway Company obtain their powers (Comp. Laws, § 6234, par. 5) reads in part as follows: "To construct its road upon or across, or its railroad tunnel under any stream of water, water-course, private road, street, lane, alley or highway, and across or under any plank road, railroad or canal, which the route of its road or railroad tunnel shall lie along or intersect; * * * and in case of the construction of such railway upon any public street, lane, alley or highway, the same shall be on such terms and conditions as shall be agreed upon between the railroad company and the common council of any city, or the village board of any village, or the commissioners of highway of any township in which the same may be; but such railway shall not be constructed upon any public street, lane, alley, highway or private way until damages and compensation be made by the railroad company therefor to the owner or owners of property adjoining such street, lane, alley, highway, or private way, and opposite where such railroad is to be constructed either by agreement between the railroad company and each owner or owners, or ascertain as herein prescribed for obtaining property or franchises for the purpose of its incorporation to be paid to the owner thereof, or deposited as hereinafter directed." Paragraph 7 has the following: "To take, transport, carry, and convey persons and property on their said road or through such tunnel by the force and power of steam, animals, or any mechanical power, or by any combination of them, and to receive tolls and compensation therefor." These provisions of the statute would seem to authorize a railway company organized under it to operate its road upon the streets of Monroe, if it obtains the consent of the common council and of the abutting property owners. The common council did consent, and adopted municipal ordinances containing in detail the conditions and terms upon which said road should be operated. It appears clear from the record that by the terms of the ordinance the parties have agreed that a local passenger business in the nature of a street railway business may be done, and that the rate of fare shall be not to exceed five cents for a ride of any distance on the routes named within the city limits; that both parties to the agreements contained in the grants understood and expressly stated their understanding to be that the railways within the limits of the city of Monroe were to be an integral portion or part of the line of railway extending northerly to the city of Detroit, southerly to the city of Toledo, and by express agreement agreed to and fixed the rate of fare chargeable for passengers taking passage in the city of Monroe to both of the above points. The parties have acted upon these agreements. The city has received a large sum of money. The defendants have made large expenditures. The roads have been built substantially as provided for by the ordinances. They are in operation. Defendants

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claim they are now observing all the terms of the ordinances; that any failure to do so at the beginning was only temporary and the fault of defendants. The only possible ground for complaint is that freight is carried which is not authorized, that excessive fare is charged, and that the streets are obstructed. The defendant, the Detroit, Monroe & Short Line Railway Company deny that this is so. Conceding that it may be true, we think it not a cause for the forfeiture of the franchises, but an occasion for the regulation of the business done by the corporation. *People v. Gaslight Co.*, 38 Mich. 154; *People v. Railway Co.*, 92 Mich. 524, 52 N. W. 1010, 16 L. R. A. 752; *Attorney General v. Suburban Railway Company*, 96 Mich. 65, 55 N. W. 562.

Judgment is affirmed.

MCCULLOCH *et al.* v. NORTH CAROLINA R. Co. *et al.*

(Supreme Court of North Carolina, Dec. 11, 1907.)

[59 N. E. Rep. 882.]

Judgment—Relief—Allegations and Proof Controlling Prayer.—A plaintiff is entitled to any remedy to which the facts alleged and proved entitle him, irrespective of the prayer for relief.

Eminent Domain—Injury to Property Not Taken—Additional Use.*

—A railroad company, owning an easement for trackage and similar

*For the authorities in this series on the question what is, and is not an additional use of land by a railroad, entitling the owner of the fee or an abutting owner to compensation, see foot-notes appended to *Abbott v. Milwaukee, etc., Co.* (Wis.), 24 R. R. R. 19, 47 Am. & Eng. R. Cas., N. S., 19; *Wilder v. Aurora, etc., Co.* (Ill.), 20 R. R. R. 99, 43 Am. & Eng. R. Cas., N. S., 99; *Laroe v. Northampton St. Ry. Co.* (Mass.), 20 R. R. R. 96, 43 Am. & Eng. R. Cas., N. S., 96 (whether a street railway is an additional servitude); *Spalding v. Macomb, etc., Ry. Co.* (Ill.), 23 R. R. R. 690, 46 Am. & Eng. R. Cas., N. S., 690 (unauthorized occupation of street by railroad as an additional servitude); *Gustafson v. Hamm* (Minn.), 1 Am. & Eng. R. Cas., N. S., 43 (test of additional servitude); *Union Pac. R. Co. v. Foley* (Colo.), 1 Am. & Eng. R. Cas., N. S., 62 (distinction between misuse and appropriation); *Gustafson v. Hamm* (Minn.), 1 Am. & Eng. R. Cas., N. S., 45 (private steam railway in street); *Willamette Iron Works v. Oregon Ry. & Nav. Co.* (Ore.), 1 Am. & Eng. R. Cas., N. S., 36 (public streets, what is an additional servitude upon); *Newton v. Manufacturers' Ry. Co.* (C. C. A.), 5 R. R. R. 739, 28 Am. & Eng. R. Cas., N. S., 739 (railroad right of way over land condemned by city for park purposes was an additional servitude with respect to owner of naked fee); *Walker v. Illinois Cent. R. Co.* (Ill.), 18 R. R. R. 439, 41 Am. & Eng. R. Cas., N. S., 439 (railroad was not so limited in use of strip granted that it could not maintain thereon any tracks in excess of a single or double track railroad, without being held to have placed an additional burden on the fee, entitling the

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purposes over plaintiff's lot, leased its entire road to defendant. Defendant had four other roads meeting at G., the town where plaintiff's lot was located. Held, that defendant was not entitled to use its easement for trackage or warehouse purposes for any traffic in which the lessor road had no part or interest without making compensation to plaintiff as for an additional burden on his land, but that the additional traffic over the lessor road, though originating on defendant's other roads, was not a subject of compensation.

Appeal—Reversal—Remand—Amendment of Pleading.—Under Revisal 1905, § 507, providing that the judge or court may before and after judgment, in furtherance of justice, etc., amend any pleading,

owner to compensation); *Kakeldy v. Columbia & R. S. R. Co.* (Wash.), 17 R. R. R. 480, 40 Am. & Eng. R. Cas., N. S., 480 (where, at the time one purchased land, it was occupied by a railroad track, the facts that subsequent to such purchase the trains became heavier, and the track was changed from narrow to standard gauge, did not entitle him to compensation—therefor); *Baldwin v. Boston & M. R. R.* (Mass.), 2 R. R. R. 607, 25 Am. & Eng. R. Cas., N. S., 607 (increase of burden where right of way over foot-path has been acquired by prescription); *Hendler v. Lehigh Valley R. Co.* (Pa.), 13 R. R. R. 46, 36 Am. & Eng. R. Cas., N. S., 40 (what material from a railroad right of way may be used without further compensation); *Rock Island & P. Ry. Co. v. Johnson* (Ill.), 9 R. R. R. 492, 32 Am. & Eng. R. Cas., N. S., 492 (laying second track of steam railroad where abutter owns fee in street); *Stephens v. New York, etc., R. Co.* (N. Y.), 7 R. R. R. 449, 30 Am. & Eng. R. Cas., N. S., 449 (abutter's right to damages where location of additional track, in violation of agreement); *Schaaf v. Cleveland M. & S. Ry. Co.* (Ohio), 4 R. R. R. 832, 27 Am. & Eng. R. Cas., N. S., 832 (electric plant as an additional burden on highway); *Chicago, etc., Ry. Co. v. Snyder* (Iowa), 11 R. R. R. 850, 34 Am. & Eng. R. Cas., N. S., 850 (erection of telegraph poles and wires along right of way, under contract between railroad and telegraph company, did not constitute an additional servitude which entitled the grantee of the person from whom the right of way had been condemned to an accounting for rents and profits received by the railroad from the telegraph company); *Atlantic Coast Line R. Co. v. Postal Telegraph Cable Co.* (Ga.), 14 R. R. R. 643, 37 Am. & Eng. R. Cas., N. S., 643 (exclusive right of occupancy acquired by telegraph company where railroad right of way was condemned for purposes of such company's line); *Schaaf v. Cleveland, M. & S. Ry. Co.* (Ohio), 4 R. R. R. 832, 27 Am. & Eng. R. Cas., N. S., 832 (interurban railway as an additional burden on highway); *Phillips v. Postal Tel. Cable Co.* (N. Car.), 5 R. R. R. 147, 28 Am. & Eng. R. Cas., N. S., 147 (use of railroad right of way for telegraph purposes an additional servitude affecting rights of owners of fee); note, 1 Am. & Eng. R. Cas., N. S., 53 (extra tracks on original grade); note, 1 Am. & Eng. R. Cas., N. S., 46 (modern judicial tendency); note, 1 Am. & Eng. R. Cas., N. S., 48 (noise, stench, etc.); note, 1 Am. & Eng. R. Cas., N. S., 46 (ordinary steam railroads); note, 1 Am. & Eng. R. Cas., N. S., 47 (private railroads); note, 1 Am. & Eng. R. Cas., N. S., 52 (railroad in street, coal house and appurtenances); note, 1 Am. & Eng. R. Cas., N. S., 47 (steam motors); note, 10 Am. & Eng. R. Cas., N. S., 222, 230 (street railways).

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etc., a pleading may be amended by the prevailing party after reversal on appeal.

Eminent Domain—Property Not Taken—Injury—Compensation—Additional Use.—Where plaintiff owns a lot subject to a right of way conveyed to a railroad company by plaintiff's grantor, the railroad company holds only a right to use so much of the right of way as is necessary for its purpose, and, though the company or its lessee cannot be barred by the statute of limitations in case it should become necessary to occupy more of the right of way for purposes incident to the use of the road, the statute is no protection in occupying more land, though within the limits of the right of way, for trackage, etc., for other purposes.

Same—Compensation—Recovery—Issues—Submission.—In an action against a railroad company, which was a lessee of a company owning a right of way across plaintiff's lot, for taking additional land for trackage purposes, etc., foreign to the use of the leased road, the following issues were tendered by plaintiff: "Was the land taken necessary for the proper handling of the exclusive business of the leased road? Has the land in controversy, since it was taken by the lessee, been used by it to handle freights belonging to other than the leased road, and which would not directly pass over it or any part thereof in transmission from the point of shipment to that of destination? What damages has the plaintiff sustained by reason of the alleged trespass?" Held, that the issues were essential to the decision of the controversy, and their refusal was error.

Appeal—Appeal by Prevailing Party.—If a judgment is only partly in favor of a party, or is less favorable than he thinks it should be, he may appeal to correct the judgment or to obtain a more favorable verdict and judgment on a new trial; but where the judgment is entirely in his favor, so that he does not desire a new trial, his appeal must be dismissed.

Same—Review—Appeal by Both Parties.—Where both parties appealed, the record in the appeal by the prevailing party could not be utilized in considering the appeal of the other party, and only the exceptions of the losing party could be considered in determining whether there should be a new trial.

Appeal from Superior Court, Guilford County; Justice, Judge.

Action by J. F. McCulloch and others against the North Carolina Railroad Company and others. From a judgment both parties appeal. Reversed on plaintiffs' appeal. Defendants' appeal dismissed.

Scott & McLean, R. D. Douglas, R. M. Douglas, and E. J. Justice, for plaintiffs.

King & Kimball, for defendants.

Plaintiffs' Appeal.

CLARK, C. J. The action of the plaintiffs is in the nature of

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an action of ejectment, and also for wrongful entry and trespass. But they are entitled, irrespective of the prayer for relief, to any remedy to which the facts alleged and proven entitle them. *Gillam v. Insurance Co.*, 121 N. C. 372, 28 S. E. 470, and numerous cases there cited. Succinctly stated, those facts are: The North Carolina Railroad Company acquired in 1850 by deed an easement in the lot in question which is now used by the Southern Railroad Company for trackage and similar purposes. The Southern Railroad Company, the defendant, as lessee of the North Carolina Railroad Company, is entitled to use said lot as fully as its lessor could have done (so far as this action is concerned) including any increased burden on the lot by reason of the increased business of said North Carolina Railroad Company's part of the business of the "Southern," whether the said business originates along the line of the North Carolina Railroad Company or originating elsewhere is shipped to any point over the line of the North Carolina Railroad. But at Greensboro, where the lot is located, the Southern Railroad Company has four railroad lines other than the North Carolina Railroad Company, to wit: One coming in from Danville, another from Mt. Airy, another from Wilkesboro and Winston, another still from the direction of Sanford. So far as business coming in those four lines is concerned which stops at Greensboro, or which at that point is carried further, not upon the North Carolina Railroad, but upon these other four lines, there is no warrant for the use of said lot for trackage or warehouse purposes for the convenience of the Southern Railroad Company as to this business in which the North Carolina Railroad has no part or interest. The North Carolina Railroad Company would have had no right to use the lot for such purely alien purposes, if it had not been leased, and it could not confer upon its lessee greater rights than it held itself.

The plaintiffs are entitled in this action to have permanent damages assessed, in the nature of condemnation, for the additional burden placed upon the lot, for its use, for purposes other than those for which it uses the lot purely as lessee of the North Carolina Railroad Company. *Hodges v. Tel. Co.*, 133 N. C. 225, 45 S. E. 572, in which case this proposition is so clearly and fully reasoned out by Connor, J., with full citation of authorities, that further discussion here would be idle repetition. The plaintiffs in their brief submit that this is all they wish i. e., compensation for the alien and additional burden, and tersely say: "Take and pay." If this cause of action is defectively stated, when the case goes back the pleadings can be amended, indeed, if the case had gone in favor of plaintiffs, they could have amended, even after judgment, to conform to the proof. Revisal 1905, § 507. The use of the roadbed and up

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to the ditches on each side thereof, at that point, by the defendant or its lessor for more than 21 years, was admitted by the plaintiffs; but, on the other hand, it was admitted by the defendant that the land outside of the ditches, but within the 100 feet on each side of the center of the track, was first taken by it for trackage purposes in 1903. So far as that trackage is used by the defendant for other purposes than to accommodate its business as lessor of the North Carolina Railroad Company, it is an additional servitude. Whether the Southern Railroad Company, not being a North Carolina corporation, can take the property for this additional servitude, under the right of eminent domain, except in so far as it may do so as lessee of those of its other lines which possess that right conferred by a charter from this state, is a matter not now before us.

It is a fact agreed in the case that the plaintiffs are owners of the 45-acre tract of land described in the complaint, subject to the right of way through the same conveyed to the North Carolina Railroad Company by deed from Hiatt, under whom plaintiffs claim, which deed was executed in 1850. The said North Carolina Railroad Company held only an easement, a right to use so much of the right of way as was necessary for its purposes. *Railroad v. Sturgeon*, 120 N. C. 225, 26 S. E. 779. But when it became necessary for the North Carolina Railroad Company itself or through its lessee to occupy more of the right of way, it cannot be barred by the statute of limitations. *Railroad v. Olive*, 142 N. C. 257, 55 S. E. 263. The taking possession of the right of way beyond the roadbed and ditches by the Southern Railroad Company was only a few days before this action was begun, and so far as it was taken to be used for trackage or other uses, alien to its rights as lessor of the North Carolina Railroad Company, it was wrongful and is not protected by any statute of limitations.

The plaintiffs tendered, among others, the following issues and excepted to their refusal: "Was the land so taken by the Southern Railway Company necessary for the proper handling of the exclusive business of the North Carolina Railroad Company? Has the land in controversy since it was taken by the Southern Railway Company been used by said Company to handle freights belonging to roads other than the North Carolina Railroad and which would not directly pass over said North Carolina Railroad or any part thereof, in transmission from the point of shipment to that of destination? What damages have the plaintiffs sustained by reason of the alleged trespass?" These issues arose upon the pleadings and were essential to the decision of this controversy. Their refusal was error, necessitating a new trial.

Error.

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Defendant's Appeal.

The judgment below was in favor of the defendant, and the case has been discussed in the opinion in the plaintiffs' appeal. During the course of the trial, the defendant excepted to the submission of the issue, to overruling the motion for nonsuit, and to the instruction to answer the issue, "Yes." There are cases in which the judgment is only partly in favor of the party obtaining it, or less favorable than he thinks that he is entitled to. In such cases he can appeal if he wishes to correct the judgment or to obtain a more favorable verdict and judgment on a new trial. But here the judgment is entirely in favor of the defendant. He does not desire a new trial or any modification of the judgment. Therefore the sole question is whether there was error committed in any of the matters excepted to in the plaintiff's appeal. If there was, there must be a new trial. If there was not, then the judgment in favor of defendant must be affirmed.

The record in the defendant's appeal cannot be looked into in considering the plaintiff's appeal, and the decision of the court in that appeal must determine whether there shall be a new trial or not. The defendant's appeal was therefore improvidently taken, and must be dismissed.

Appeal dismissed.

CHICAGO, P. & ST. L. RY. CO. *v.* TICE *et al.*

(Supreme Court of Illinois, Feb. 20, 1908.)

[83 N. E. Rep. 818.]

Railroads—Mortgages—Construction—Property Conveyed—After-Acquired Property.—Where a railroad company gave a trust deed of its right of way, stations, depot grounds, or buildings built or to be built, or to be thereafter acquired and all property thereafter to be acquired for the purpose of its railroad and afterwards acquired an undivided half of certain land, its interest therein did not pass under the trust deed, since there was no purpose to which a railroad could put an undivided half interest in land.

Tenancy in Common—Adverse Possession—Requisites—Notice to Co-Tenant.—Defendant on September 3, 1873, conveyed an undivided half interest in certain land to the S. & N. R. Co., in consideration of its placing a station on the land, which it failed to do, but located it elsewhere. The deed was not recorded until December 30, 1880. February 1, 1871, the S. & N. R. Co. had executed a trust deed of its right of way, stations, depot grounds, etc., and of all property thereafter acquired for the purpose of its railroad, which trust deed was foreclosed, and the property sold and purchased by complainant, who received a deed dated April 20, 1878. June 10, 1878, defendant executed a mortgage conveying the whole title which was duly recorded. October 6, 1880, complainant bought of defendant a two-acre tract purported to have been conveyed by the deed. Defendant paid the taxes on the lands in controversy and held actual possession for himself. Complainant never included the land in its tax list. Held, that the possession of defendant was adverse, so as to bar by the 20-year statute of limitations, an action for partition filed June 16, 1907.

Appeal from Circuit Court, Menard County; Guy R. Williams, Judge.

Petition by the Chicago, Peoria & St. Louis Railway Company against Anderson W. Tice and others. From a judgment dismissing the bill, plaintiff appeals. Affirmed.

Charles Nusbaum and *E. H. Golden*, for appellant.

Smoot & Laning, for appellees.

CARTWRIGHT, J. Appellant commenced this suit on January 16, 1907, by filing its bill for partition in the circuit court of Menard county against the executor of the will of John Tice, deceased, and the devisees under said will, who are the appellees, claiming an undivided one-half of all that part of the southeast quarter of the northeast quarter of section 29, township 18, in said county, which lies south of the right of way of

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appellant's railroad, containing about 36 acres, and praying for a partition of the same accordingly. The title claimed by the complainant, as set forth in the bill, was by virtue of a deed executed by the said John Tice and wife, dated September 3, 1873, and recorded December 30, 1880, to the Springfield & Northwestern Railroad Company, conveying that part of said 40-acre tract lying north of said railroad and the undivided one-half of that part lying south of the railroad in consideration of the location of the depot building and stockyards of the railroad company on said tract of land. The bill alleged that the title of the Springfield & Northwestern Railroad Company had passed to complainant by virtue of the foreclosure of a trust deed executed by the Springfield & Northwestern Railroad Company, dated February 1, 1871, and a purchase by complainant at the foreclosure sale. The defendants by their answer admitted the execution by John Tice and his wife of said deed and the recording of the same, and averred that the sole consideration of the deed was the location by the grantee, on said lands, of the depot building and stockyards; that the depot building and stockyards were never constructed, but were built on other lands; that John Tice never relinquished possession of the lands, but retained the same, and held possession under a claim of exclusive title and ownership, and paid all taxes from the date of said deed until his death, on November 22, 1904—a period of more than 30 years—and that his possession was at all times hostile and adverse to every other claim or interest. The defendants pleaded the statute of limitations of 20 years, and denied the claim and title of the complainant. The cause was referred to the master in chancery to take and report the evidence. The court heard the cause on the evidence taken and reported by the master, and dismissed the bill for want of equity.

The facts proved are as follows: The Springfield & Northwestern Railroad Company executed a trust deed, in 1871, of its right of way, stations, depot grounds or buildings built or to be built, or to be thereafter acquired, and all property that might thereafter be acquired for the purpose of its railroad. John Tice owned the 40-acre tract in question and other lands lying east of it, and in the year 1873 the railroad company projected its line of railroad across said tract and entered into an agreement with him by which he executed the deed in question for the sole consideration that the company would locate its depot building and stockyards on said tract. The deed was made September 3, 1873, and about that time the railroad company was negotiating for right of way over lands lying west of the land in question, and in settlement of the claim of the owner agreed to construct its depot on that land. It kept the second agreement, and about 1½ or 2 years afterward it constructed

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its depot building on the other land west of this. No depot was ever constructed on this land, but stockyards were built on the two-acre tract north of the railroad, which was included in the deed. The stockyards were soon permitted to fall into decay and were not fit for loading stock, but remained there about 15 years, when they were completely rotted down. There were no stockyards at the place until about 9 years ago, when pens were built on the south side of the railroad with the consent of John Tice and by agreement with him. The agreement, which furnished the only consideration for the deed, was never complied with, and John Tice remained in the continuous and exclusive possession of the property in dispute in this case for more than 30 years. He paid all the taxes, made repairs, leased the land, collected and retained all rents, and on June 10, 1878, executed a mortgage which conveyed the whole title, and was duly recorded. The trust deed on the railroad was foreclosed, and complainant became the purchaser, and received a deed dated April 20, 1878, for the property described in the mortgage. On October 6, 1880, complainant bought from John Tice for \$400 the two-acre tract north of the railroad, which the deed in question purported to convey. Neither the Springfield & Northwestern Railroad Company nor complainant ever paid any taxes on the property, and the complainant did not include it in the schedule of its property, other than railroad track, for taxation.

The complainant presented to the circuit court a state of facts which would not commend it to a court of equity. It insisted that it had title to the undivided one-half of 36 acres of land derived through the foreclosure of a mortgage made by the Springfield & Northwestern Railroad Company, the grantee in a deed executed for the sole consideration that the said company would locate its depot and stockyards on the lands, and the grantee had immediately violated its agreement by locating the depot on other land for another consideration. The complainant's position was that the failure to locate the depot was not such a condition as would authorize a forfeiture of the estate, but was a personal covenant of the grantee not running with the land, and therefore the complainant held title while the devisees of the grantor were relegated to an action for damages long since barred by the statute of limitations and against an insolvent and defunct corporation. Such a claim would merit but scant consideration by a court desirous of doing justice; and, if necessary, we think the court could properly have found that the agreement was entered into with a fraudulent intent of not complying with it, and might have set aside the deed for that reason. In fact, the evidence justifies the belief that the grantee abandoned the whole matter and claimed nothing under the deed, which was never recorded until 1880, after the purchase by the

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complainant. We think it clear, however, that the complainant had no title to assert, regardless of questions of fraud, condition subsequent, or forfeiture.

The trust deed of the Springfield & Northwestern Railroad Company conveyed the existing railroad property of the corporation and property afterward to be acquired for the purposes of its railroad. The undivided one-half of 36 acres of land constituting that part of the 40-acre tract south of the railroad was not acquired for purposes of the railroad. There was no railroad purpose to which the corporation could have put an undivided one-half of such a piece of land, and on a partition it might have acquired a tract in severalty separate from its railroad property. There was not even a village at the station and scarcely any business was done there—not enough to justify keeping up the stock pens, which rotted down. With a large recent increase in the population there are now but 300 inhabitants in the place, and conceding that, as the corporation had power to take real estate for the purposes of its railroad, the question whether it exceeded its power in receiving the conveyance was one which could only be raised by the state and that the legal title passed to the corporation, the trust deed did not cover it, for the reason that it was after-acquired property not acquired for the purposes of the railroad. It was not within the terms of the trust deed, and the foreclosure did not carry title to the complainant.

Another complete defense was made under the statute of limitations. It is true that the possession of a tenant in common can only become adverse to his co-tenant by an intention to hold adversely, an adverse holding in fact, and notice of the intention to the co-tenant. It is not sufficient that one tenant in common occupies the premises and appropriates to himself the exclusive rents and profits, makes slight repairs and improvements on the land, and pays the taxes, all of which may be consistent with the continued recognition of the rights of his co-tenant, but there must be outward acts of exclusive ownership, unequivocal, overt, and notorious, and of such a nature as by their own import to give notice to the co-tenant that an adverse possession and an actual disseisin are intended to be asserted against him. *Busch v. Huston*, 75 Ill. 343; *Ball v. Palmer*, 81 Ill. 370. The acts of John Tice were such as to give the railroad company to understand that he claimed the entire estate, that he was not holding possession for the railroad company, and that he held the entire possession for himself, so as to set the statute of limitations in motion, and impose upon the railroad company the necessity of protecting its interest. His adverse possession continued for more than 30 years, and more than 20 years before his death he executed a mortgage purporting to convey the entire title. Beyond all question the complainant was informed of the adverse

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claim set up by Tice when it purchased, in the year 1880, the two-acre tract north of the railroad which was included in the deed, and which already belonged to the complainant, if the undivided one-half south of the railroad does. The complainant did not include the property in its real estate other than railroad track listed for taxation, and not only knew of the adverse claim, but everything indicates that it conceded the claim to be just. The bar of the statute of limitations had become complete long before the bill was filed.

The decree of the circuit court is affirmed.
Decree affirmed.

ALBRIGHT v. ATCHISON T. & S. F. RY. CO.

(Supreme Court of Iowa, March 11, 1908.)

[115 N. W. Rep. 219.]

Appeal—Review—Discretion of Lower Court—Reception of Evidence.—The court's discretion in sustaining objections to questions to a party testifying, because they are not cross-examination, is not reviewable.

Principal and Agent—Actions—Defenses by Principal—Set-Off.—In an action for the price of certain railway tickets bought from defendant's agent, which defendant refused to deliver on the ground that the order therefor was given by its agent without authority as collateral security for a personal loan, defendant was not entitled to credit for a sum which plaintiff owed the agent on another transaction, since the personal affairs between plaintiff and the agent could not be settled in the action.

Same—Powers of Agents—Deposits and Payments—Railroad Agent.*—An agent of a railroad corporation, having power to sell prepaid coupon ticket orders for cash, has no authority to bind his company by depositing orders as security for his own debts, and, if he so does, the corporation is not bound thereby, and it is the duty of a person dealing with such an agent to know that he is acting within the authority conferred upon him by his principal.

Appeal—Review—Verdicts on Conflicting Evidence.—A verdict on

*For the authorities in this series on the subject of the implied authority of a carrier's freight or ticket agents, see foot-notes appended to *Gulf, etc., Ry. Co. v. Jackson & Edwards (Tex.)*, 19 R. R. R. 125, 42 Am. & Eng. R. Cas., N. S., 125, where all those preceding it are collected; foot-notes appended to *Bergstrom v. Chicago, etc., Ry. Co. (Iowa)*, 25 R. R. R. 140, 48 Am. & Eng. R. Cas., N. S., 140; *Clark v. Ulster & D. R. Co. (N. Y.)*, 24 R. R. R. 583, 47 Am. & Eng. R. Cas., N. S., 583; *Southern Ry. Co. v. Gardner (Ga.)*, 23 R. R. R. 549, 46 Am. & Eng. R. Cas., N. S., 549.

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conflicting evidence will not be disturbed because the Supreme Court would have found otherwise, and especially so where the trial court heard the witnesses and overruled a motion for a new trial.

Appeal from District Court, Polk County; Hugh Brennan, Judge.

Action at law to recover the purchase price of certain railway tickets purchased by plaintiff of one of defendant's agents, which tickets defendant refused to deliver upon demand. Defendant denied the sale of the tickets, and pleaded that the order therefor was given by its agents to plaintiff without authority as collateral security for a personal loan. Upon these issues the case was tried, resulting in a verdict and judgment for plaintiff, and defendant appeals. Affirmed.

Thomas R. Morrow and W. S. Hamilton, for appellant.
Allen & Lingenfelter, for appellee.

DEEMER, J. One E. L. Palmer was city passenger agent of the defendant company for the city of Des Moines, and as such issued an order upon the Wabash Railway for six railway tickets from Des Moines to Los Angeles, Cal., and return, via the Wabash and the defendant railway. This order was delivered to plaintiff, and he, plaintiff, as he claims, paid therefor the sum of \$500 in the form of a check issued to E. L. Palmer, agent of defendant company, which was indorsed by him as agent for said company. At the same time the agent, Palmer, gave plaintiff a written statement to the effect that the company would refund the money in the event the order was not used. The time limit of this order was something like three months. Near the expiration of that time plaintiff, according to his testimony, concluded not to use the order, and he called upon the agent for the return of his money, and secured \$100 thereof some time in August of the year 1904, and later, and about November of the same year, he received an order for five tickets, instead of six, and \$110 more in money. He afterwards demanded the tickets of defendant or the return of the money paid by him therefor. This was refused, and this action was then commenced to recover the sum of \$492.59, less the \$110 paid by the agent of the company. The case was submitted to the jury, for it to determine whether or not there was a bona fide order for the tickets, or whether the transaction was simply a loan by plaintiff to defendant's agent secured by these orders for tickets. The finding was that the transaction was not a loan, and a verdict for plaintiff in the sum of \$315.28, being the sum of \$290, with interest, was returned. Appellant contends that the verdict should have been for it, and that the trial court was in error in its rulings on evidence, and in refusing certain instructions asked by it. Plain-

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tiff, when on the witness stand, was asked upon cross-examination if he had any property, or any property outside of his \$1,200 per year salary. To this an objection that it was not proper cross examination was incompetent, irrelevant, and immaterial, was sustained. This was material only as we view it upon the question as to whether or not he had the money wherewith to buy the tickets. There can be no doubt, under this record, that plaintiff had the money; for he gave it to the agent either as a loan or in payment of the order for tickets. That he was a man of small means would not indicate that he did not intend to travel. Many people travel who perhaps cannot afford to do so, and many wealthy people do not travel at all. The objection may have been sustained because not cross-examination, and, if this be true, there should be no reversal, as much of necessity must be left to the large discretion of the trial court in such matters.

2. It is claimed that defendant should have had a further credit of \$20 upon the order, because plaintiff was owing Palmer the sum of \$20 on another transaction. But manifestly this cannot be so. The personal affairs between plaintiff and Palmer could not be settled in this action.

3. The trial court refused all of the instructions asked by defendant, and, in lieu thereof, gave the following on its own motion: "Third. The testimony in this case shows without dispute that the authority of the said Palmer, as agent of this defendant company, was to sell orders for railway tickets for cash only, and if you find that the said Palmer in the month of April, 1904, issued to the plaintiff herein an order for railway tickets, and such order was given to the plaintiff, not for cash, but as security for a debt, and that the order involved in this action and introduced in evidence in this case was issued to take up the first order aforesaid, then you are instructed to find that the issue of the second order was without authority, and does not bind the defendant company. An agent of a corporation, having power to sell prepaid coupon ticket orders belonging to his employer, for cash, has no authority to bind his company by a transaction in which he deposits the orders of the said company as security for his own debts, and, if he does so deposit said orders, the action on his part is without legal authority, and the company he represents is not bound by his action. And it is the duty of a person dealing with such an agent to know that the agent in so transacting business is acting within the authority conferred upon him by his principal." This embodied the thought contained in defendant's requests, and stated the law as we understand it. See *Wyckoff v. Davis*, 127 Iowa, 399, 103 N. W. 349.

4. The only debatable question in the case, and the only one worthy of serious consideration, is the sufficiency of the testi-

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mony to support the verdict. Plaintiff testified, and to some extent he is corroborated by others, that he with others was expecting to take a trip to California, that the regular round-trip rate at the time he purchased the ticket was \$98.50 each; that he was in the habit of buying tickets from Palmer, and that he purchased the orders, thinking he would use the tickets, and that, if he did not do so, the company through its agent agreed to and would return the purchase price. After he received the order for the five tickets, he concluded he would not make the trip, and he demanded the return of his money. The agent returned \$110 of the amount paid, and, being unable to secure any more, he, plaintiff, then tried to get the five tickets or the return of his money, but his efforts were unavailing. It does not appear that plaintiff extended any personal credit to Palmer. He made his check for \$500 payable to Palmer as agent of the defendant company, and Palmer as such agent indorsed it, and received the money thereon. Palmer made no note to plaintiff, nor were there other evidences of the transactions, save as heretofore indicated. These are regular on their face, and shows a transaction clearly within the scope of the agent's authority. Plaintiff testified that he bought the tickets for the use of his wife and family, and another or others who had talked about going with them. Palmer, the agent, was a witness for the defendant, and he testified, in substance, that he personally borrowed \$500 of plaintiff, and gave the ticket orders as security for his loan. He said, however, in that connection, that Albright spoke of the number of tickets he could use. Palmer got the money on plaintiff's check, and admits that he never turned it over to the defendant. Plaintiff testified unequivocally that he was talking about going to California and expected to go, and that he had not given up the notion when he received the order for the five tickets. If the case were triable de novo, we should be inclined to find for the defendant; but, as will be observed, the conclusion depends upon the credit to be given plaintiff's testimony, and this as also the weight thereof was for the jury. The trial court also saw and heard the witnesses, and overruled defendant's motion for a new trial. In view of the entire record, we do not feel like interfering with the verdict, although we should have been better satisfied with a verdict the other way.

The judgment must be, and it is, affirmed.

ANN M. HAIRSTON, Plff. in Err., v. DANVILLE & WESTERN RAILWAY COMPANY.

(Argued January 10, 13, 1908. Decided February 24, 1908.)

[28 Sup. Ct. Rep. 331.]

Constitutional Law—Due Process of Law in Condemnation Proceedings—Public Use.*—The condemnation of land by a railroad company for a spur track will not be held to be for a private use, and therefore forbidden by the United States Constitution, 14th Amendment, where the state courts, in effect, have held that the use was public, on evidence tending to show that the spur track was designed, in part, for the storage of cars while loading and unloading, and to relieve the congestion of business, although the motive which dictated its location over the land in question was to reach a private industry, which contributed to the cost.

—In Error to the Supreme Court of Appeals of the State of Virginia to review a judgment denying a review of a judgment of the Circuit Court of Henry County, condemning land for railroad purposes. Affirmed.

Statement by MR. JUSTICE MOODY:

This is a writ of error to the highest court of the state of Virginia. The defendant in error is a corporation created by the state of Virginia and operating a railroad entirely within that state. Its main line runs near the town of Martinsville, and from it a branch line runs into Martinsville and there ends. The railway company began a proceeding in a circuit court of Hairston, the plaintiff in error, for the construction of a spur track, which was alleged to be needed for the transaction of its business, for the accommodation of the public generally, and for the purpose of reaching the factory of a large shipper, the Rucker & Witten Tobacco Company. By pleadings duly filed the landowner set up the defense (*inter alia*) that the proposed condemnation was not for a public use, and was therefore contrary to the Constitution and laws of Virginia and the 14th Amendment to the Constitution of the United States. Testi-

*For the authorities in this series on the question, what does, and does not, constitute a public use for which property may be condemned, see foot-notes appended to *Healy Lumber Co. v. Morris* (Wash.), 12 R. R. R. 171, 35 Am. & Eng. R. Cas., N. S., 171, where all those preceding it are collected or referred to; foot-notes appended to *Caretta Ry. Co. v. Virginia-Pocahontas Coal Co.* (W. Va.), 24 R. R. R. 761, 47 Am. & Eng. R. Cas., N. S., 761; *State v. Olympia L. & P. Co.* (Wash.), 24 R. R. R. 757, 47 Am. & Eng. R. Cas., N. S., 757; foot-notes appended to *Kansas City, etc., Ry. Co. v. Louisiana W. R. Co.* (La.), 24 R. R. R. 8, 47 Am. & Eng. R. Cas., N. S., 8.

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mony was taken on this issue before the judge of the circuit court, who found against the contention, and appointed commissioners to ascertain the damage caused by the taking. The commissioners ascertained the amount of the damages. The judge confirmed their report, and ordered that, upon payment of the damages, a fee simple in the land should be vested in the railway company. The landowner petitioned the supreme court of appeals to grant a writ of error to review the judgment of the circuit court. The petition was denied, and a writ of error transferring the record to this court was allowed.

The uses for which the land sought to be condemned was needed are described in the testimony of the superintendent of the railroad. The material parts of it follow:

"The Danville & Western comes into Martinsville on a branch spur from the main line, running between Danville and Stewart. This spur leaves the main line about very nearly half a mile east of Martinsville. It comes into Martinsville and ends at Franklin street. The Danville & Western has in the town of Martinsville this main line referred to. The main line proper runs parallel with and about 3 feet from the platform of the freight and passenger station. Parallel to this track there is another track, about 15 feet between the centers of the two tracks, running parallel with and about 4 or 5 feet from the Alliance warehouse. Both of those tracks are spur tracks, and end at Franklin street. The company also has a freight and passenger station and platform, with a portion of the platform shedded. There is also another track, designated Tabernacle track. This track is several hundred feet east of this freight and passenger station referred to, and is parallel with the main line. This track will hold seven box cars, but is quite a heavy grade,—about 2 feet to the hundred feet. There is also parallel with the main line and also parallel with this Tabernacle track a spur track, which is designated spur track. These are all the tracks that the company has in the town of Martinsville, except a track known as Lester's siding. This, however, is a private siding and is fenced in. The gate is, as a rule, locked, and the company can use for its business only about two box-car lengths on the outside of the fence. When I took charge of the road as superintendent, on the 10th day of September, 1903, I was very much impressed with the congested condition of things in Martinsville, the danger of operating the yard, and was especially impressed with the lack of team track room; I mean by that, suitable tracks on which solid cars loaded with freight can be placed, such freight to be unloaded by consignees and teams, or *vice versa*; tracks to place empty cars on, into which shippers could load freight from their teams. I found only space for three box cars,—I mean by that, proper and suitable space. That was the portion of the track described as parallel with the

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platform, and west of the station building, about three car lengths. Being impressed with the danger of operating this yard, soon after taking charge I gave positive instructions that the track designated as Tabernacle track must never be used for storing cars, and must be kept clear and used only to pass trains. The track was built and intended to pass trains,—that is, to sidetrack one train on it and let the other pass. On account of the increase of the business at Martinsville, it has been necessary to change these instructions, and we have been forced to use the Tabernacle track on which to place team track cars, solid cars to be unloaded by consignees. * * * In order to get out of Franklin street I selected a lower route, and employed a competent engineer to lay off and make plans for the most feasible track, to obtain as much team track room as possible, and at the same time to reach the plant of the Rucker & Witten Tobacco Company. I was informed that this plant would be very greatly enlarged, and in fact the entire business of this concern would eventually be consolidated at Martinsville. By adopting the route proposed we would not only reach the plant of the Rucker & Witten Tobacco Company and thereby secure for the Danville & Western a great increase in business, but we would also greatly enlarge our team track facilities. I mean by that, the portion of the track on which loaded cars would be placed to be unloaded by merchants and others in Martinsville doing business here. The map shows that about 500 feet of this proposed track is level; this would be used entirely for the public. This 500 feet would store about 16 or 18 team track cars, and will be used entirely to place cars on for the general public. In addition to that we would reach the Rucker & Witten Tobacco Company's plant, and we would thus be enabled to place cars for that concern immediately at the factory doors, thus relieving the short team track we have in the yard, and also doing away entirely with the danger of using this Tabernacle track as a team track. We can also place empty cars at the Rucker & Witten Tobacco Company's plant, in which they can load their tobacco shipments. This will also greatly relieve us at the station. This concern has within the last thirty days made in one shipment 14 solid cars of manufactured tobacco, going to one destination, and all shipped the same day. At present we have team track room for seven cars on this Tabernacle siding, which, I have explained, is on a grade of about 2 feet to the hundred feet, and, therefore, very dangerous to operate and to stand cars on. There is room for three cars west of the station building between the station building and Franklin street, and on this same track there is room for five cars to be placed at the platform. These last five cars are, as a rule, merchandise cars that come here loaded for various consignees, and are unloaded by the station force

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into the station building. Unloaded freight is placed by shippers on the platform and is loaded into empty cars standing in this same five-car space. In order to meet the demands of the business, therefore, it is absolutely necessary to obtain more and better terminal facilities here. We wish to get away from the danger of using this Tabernacle track as a team track as early as possible. The track is on a heavy grade and cars are liable to get loose and roll down the grade. In case one of these cars should happen to get loose just as a train was approaching Martinsville a serious accident would result, the grade is so heavy. Consignees sometimes attempt to move cars a little themselves, and are not able to hold them, and they strike the others on the track, and they have invariably been derailed. We have in the last sixty days had several derailments on this track. I will say, on account of the danger, the east end of the track is protected by a modern safety switch,—derailing switch. When the cars strike this switch, they are thrown off the track on the ground. That damages the cars, and damages the track, and causes delay and expense in rerailling them again. To give some idea of the increase of business at Martinsville. I will state that the auditor of the Danville & Western Company made me a statement for November and December, 1904, as compared to same months last year, outbound or forwarded business in November, 1904.

"Mr. Staples: Will you file that report with your deposition?

"The Witness: Yes, sir.

"Answer (continued): Outbound or forwarded business for November, 1904, as compared with same month 1903, shows an increase of about $16\frac{2}{3}$ per cent. The inbound business for November, 1904, compared to same month last year, shows an increase of about 89 per cent. The outbound business for December, 1904, as compared to same month 1903, shows an increase of about $16\frac{2}{3}$ per cent. and the inbound business for December, 1904, as compared to same month last year, shows an increase of about 100 per cent. So, in order to at all handle the business with safety or convenience to patrons it is absolutely necessary to get more and better terminal facilities. In order to do that, we have located what we think to be the best and most feasible line to accomplish the two objects,—get the terminal facilities, and at the same time reach the plant of the Rucker & Witten Tobacco Company.

"Q. Now, Major, will there be access along the line from Fontaine street to the depot of the Danville & Western Ry., in Martinsville, for the purpose of reaching the cars standing upon the track?

"A. These cars will be standing on this proposed track, not at the station, and parties can reach such cars with ease from

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Fontaine street. It is also proposed to have an entrance on the alley near the Alliance warehouse, near the proposed track.

"Q. Has the city of Martinsville grown very much in size and business within the last year or two?

"A. It has grown very much in business over our line, and I notice there is considerable building.

"Q. Well, in your opinion, is this proposed extension of your track necessary for the public convenience and for enabling the railroad to meet the business demands of the city of Martinsville?

"A. It is, sir. There is another fact of public interest which occurs to me that probably the court would like to know. The manufactures, or parties who use steam coal, are more conveniently located to the Danville & Western station than to the Norfolk & Western station. The coal, however, comes into Martinsville over the Norfolk & Western. The manufacturers are very anxious to handle this coal on the Danville & Western tracks on account of saving which there would be in drayage and on account of convenience. We have an understanding with the Norfolk & Western traffic people that we will switch this coal to our tracks. It is not practicable now to do this, because we have no track room. It will be practicable if this proposed road is built, and that is the object of the understanding.

"Q. Then this proposed extension will be, or will it not be, for the use of the public and for the reception and delivery of consignments by your railway to the entire public?

"A. It will be for the use of the public in that cars loaded with car-load shipments consigned to various consignees in Martinsville will be placed on these tracks to be unloaded, and empty cars will be placed on these tracks to be loaded by shippers.

"Q. You mean by shippers, shippers generally?

"A. Yes, sir; shippers generally; anybody who wants to ship a car load of freight will get his car on the track."

The testimony given by other witnesses did not materially add to or affect this evidence, though the other testimony and the cross-examination of the superintendent tended to show that, in order to render the general public use of the spur track practicable and convenient, grading, the construction of retaining walls, and the improvement and change of grade of Fountain street would be required. It was shown that the tobacco company agreed, in writing, to give to the railway company a part of the land over which the spur track was to be constructed, and to pay the cost of the remainder. The railway company, on the other hand, agreed to continue the operation of the spur track as long as the tobacco factory was operated, but reserved the option to abandon the spur track in case the factory was abandoned for six months. In that case the land given by the tobacco company was to revert to it.

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Messrs. Walter R. Staples, Abram P. Staples, John W. Carter, and Hunt & Staples, for plaintiff in error.

Messrs George E. Hamilton and M. J. Colbert for defendant in error.

MR. JUSTICE MOODY delivered the opinion of the court:

The condemnation of land in this case has been held by the courts of Virginia to be authorized by the Constitution and laws of this state, and we have no right to review that aspect of the decision. The law of Virginia permits no exercise of the right of eminent domain except for public uses. *Fallsburg Power & Mfg. Co. v. Alexander*, 101 Va. 98, 61 L. R. A. 129, 99 Am. St. Rep. 855, 43 S. E. 194; *Dice v. Sherman* (Va.) 59 S. E. 388. Therefore it must be assumed that this taking was held to be for public uses, although there was no specific finding of the fact, but only a general judgment of condemnation. The plaintiff in error, however, insists that the record in this case, which includes all the evidence, shows, unmistakably, that the taking was for private uses, and that the claim by the railway company, that the spur track was designed in part for public uses, is no better than a colorable pretense. We assume that, if the condemnation was for private uses, it is forbidden by the 14th Amendment. *Missouri P. R. Co. v. Nebraska*, 164 U. S. 403, 41 L. Ed. 489, 17 Sup. Ct. Rep. 130; *Falbrook Irrig. District v. Bradley*, 164 U. S. 112, 161, 41 L. Ed. 369, 389, 17 Sup. Ct. Rep. 56; *Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U. S. 239, 251, 252, 260, 49 L. Ed. 462, 467, 468, 471, 25 Sup. Ct. Rep. 251; *Clark v. Nash*, 198 U. S. 361, 369, 49 L. Ed. 1085, 1088, 25 Sup. Ct. Rep. 676; *Strickley v. Highland Boy Gold Min. Co.*, 200 U. S. 527, 50 L. Ed. 581, 26 Sup. Ct. Rep. 301.

We proceed to consider whether the uses of the spur track for which the land was taken were private, and therefore such uses for which a taking by the right of eminent domain is forbidden by the 14th Amendment. The courts of the states, whenever the question has been presented to them for decision, have, without exception, held that it is beyond the legislative power to take, against his will, the property of one and give it to another for what the court deems private uses, even though full compensation for the taking be required. But, as has been shown by a discriminating writer (1 Lewis, Em. Dom. 2d Ed. § 157), the decisions have been rested on different grounds. Some cases proceed upon the express and some on the implied prohibitions of state Constitutions, and some on the vaguer reasons derived from what seems to the judges to be the spirit of the Constitution or the fundamental principles of free government. The rule of state decision is clearly established, and we have no occasion here to consider the varying reasons which have influenced its adoption. But when we come to inquire what are public uses

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for which the right of compulsory taking may be employed, and what are private uses for which the right is forbidden, we find no agreement, either in reasoning or conclusion. The one and only principle in which all courts seem to agree is that the nature of the uses, whether public or private, is ultimately a judicial question. The determination of this question by the courts has been influenced in the different states by considerations touching the resources, the capacity of the soil, the relative importance of industries to the general public welfare, and the long-established methods and habits of the people. In all these respects conditions vary so much in the states and territories of the Union that different results might well be expected. Some cases illustrative of the tendency of local conditions to affect the judgment of courts are *Hays v. Risher*, 32 Pa. 169; *Boston & R. Mill Corp. v. Newman*, 12 Pick. 467, 23 Am. Dec. 622 (Conf. Lowell v. Boston, 111 Mass. 454, 15 Am. Rep. 39); *Turner v. Nye*, 154 Mass. 579, 14 L. R. A. 487, 28 N. E. 1048; *Ex parte Bacot*, 36 S. C. 125, 16 L. R. A. 586, 16 S. E. 204; *Dayton Gold & S. Min. Co. v. Seawell*, 11 Nev. 394; *Hand Gold Min. Co. v. Parker*, 59 Ga. 419; *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9, 28 L. Ed. 889, 5 Sup. Ct. Rep. 441; *Clark v. Nash*, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676; *Strickley v. Highland Boy Gold Min. Co.*, *supra*; *Otis Co. v. Ludlow Mfg. Co.*, 201 U. S. 140, 50 L. Ed. 696, 26 Sup. Ct. Rep. 353. The propriety of keeping in view by this court, while enforcing the 14th Amendment, the diversity of local conditions, and of regarding with great respect the judgments of the state courts upon what should be deemed public uses in that state, is expressed, justified, and acted upon in *Falbrook Irrig. District v. Bradley*; *Clark v. Nash*; and *Strickley v. Highland Boy Gold Min. Co.*,—*ubi supra*. What was said in these cases need not be repeated here. No case is recalled where this court has condemned, as a violation of the 14th Amendment, a taking upheld by the state court as a taking for public uses in conformity with its laws. In *Missouri P. R. Co. v. Nebraska*, *ubi supra*, it was pointed out (p. 416) that the taking in that case was not held by the state court to be for public uses. We must not be understood as saying that cases may not arise where this court would decline to follow the state courts in their determination of the uses for which land could be taken by the right of eminent domain. The cases cited, however, show how greatly we have deferred to the opinions of the state courts on this subject, which so closely concerns the welfare of their people. We have found nothing in the Federal Constitution which prevents the condemnation by one person for his individual use of a right of way over the land of another for the construction of an irrigation ditch; of a right of way over the land of another for an aerial bucket line;

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or of the right to flow the land of another by the erection of a dam. It remains for the future to disclose what cases, if any, of taking for uses which the state Constitution, law, and court approve will be held to be forbidden by the 14th Amendment to the Constitution of the United States.

Entering upon the consideration of the case at bar in the spirit of our previous decisions, it presents no difficulties. The Virginia court has, in effect, found that the condemnation was for public uses. The evidence fully warranted that finding. We need not consider whether a condemnation by a railroad, authorized by a state law and approved by the state court, of land for the construction of a spur track to be used solely to transport commodities to the main line and thence to the place of sale and consumption throughout the country, is a violation of the 14th Amendment; nor the authorities bearing upon the question whether such a use is public. Here the proposed spur track can be used, and was designed to be used, not only for access to the factory of the tobacco company, but for the storage of cars to be laden or unladen by receivers and shippers of freight, and to relieve the congestion of business which, through the growth of the town, overburdened the limited trackage of the railroad. We think the court below was justified in finding that the superintendent testified accurately when he said: "In order to meet the demands of the business, therefore, it is absolutely necessary to obtain more and better terminal facilities here;" and "We have located what we think to be the best and most feasible line to accomplish two objects,—get the terminal facilities, and at the same time reach the plant of the Rucker & Witten Tobacco Company;" and "It will be for the use of the public, in that cars loaded with car-load shipments * * * will be placed on these tracks to be unloaded and empty cars will be placed on those tracks to be loaded by shippers." This testimony describes a use which is clearly public. *Chicago, B. & N. R. Co. v. Porter*, 43 Minn. 527, 46 N. W. 75; *Ulmer v. Lime Rock R. Co.*, 98 Me. 579, 66 L. R. A. 387, 57 Atl. 1001; *Chicago & N. W. R. Co. v. Morehouse* (Re *Chicago & N. W. R. Co.*) 112 Wis. 1, 56 L. R. A. 240, 88 Am. St. Rep. 918, 87 N. W. 849; *St. Louis, I. M. & S. R. Co. v. Petty*, 57 Ark. 369, 20 L. R. A. 434, 21 S. W. 884; *Zircle v. Southern R. Co.*, 102 Va. 17, 102 Am. St. Rep. 805, 45 S. E. 802. The uses for which the track was desired are not the less public because the motive which dictated its location over this particular land was to reach a private industry, or because the proprietors of that industry contributed in any way to the cost.

We have considered the elaborate argument of counsel, that the track was not intended for the use of the public generally, and that it could not, in fact, be so used, and are not convinced by it. The judgment is affirmed.

NEWHOUSE v. KANAWHA & W. V. R. Co.

(Supreme Court of Appeals of West Virginia, Nov. 12, 1907. Rehearing Denied Jan. 7, 1908.)

[59 S. E. Rep. 1071.]

Master and Servant—Safe Place to Work—Duty of Master.—A reasonably safe place to work, which it is a nonassignable duty of the master to provide, includes, in the case of railroads, the entire track over which the servant is required to pass in discharge of his duties.

Trial—Directing Verdict.—Where, in an action to recover damages for injury due to negligence, there is evidence which tends in a fairly appreciable degree to prove negligence, it is error to strike out the evidence of the plaintiff and direct a verdict for defendant.

Master and Servant—Negligence of Master.*—Generally, as between master and servant, negligence will not be imputed from the circumstance alone of injury due to defective machinery or appliances, but some affirmative acts of negligence, either of omission or commission, must be shown.

Same—Negligence—Question for Jury.—But evidence showing suspension of wire cables across a railroad track so low as to obstruct the passage of a train, and actually obstructing the track but a short time before injury results therefrom, is sufficient, in an action by a servant injured thereby while riding home from his place of work on the construction train of the defendant company, to constitute a prima facie case of negligence, entitling him, until explained by the defendant consistently with the exercise of due care, to have such evidence submitted to the jury.

(Syllabus by the Court.)

Error from Circuit Court, Kanawha County.

Action by Louis Newhouse against the Kanawha & West Virginia Railroad Company. Judgment for defendant, and plaintiff brings error. Reversed, and new trial granted.

Wertz & Van Fleet, for plaintiff in error.

Chilton, MacCorkle & Chilton and *T. R. English*, for defendant in error.

*For the authorities in this series on the question whether a presumption of negligence arises from the fact that an employee is injured, see foot-notes appended to *Baltimore & O. R. Co. v. State* (Md.), 16 R. R. R. 399, 39 Am. & Eng. R. Cas., N. S., 399; foot-notes appended to *Cully v. Northern Pac. Ry. Co.* (Wash.), 13 R. R. R. 165, 36 Am. & Eng. R. Cas., N. S., 165, where all those preceding it are collected; foot-notes appended to *St. Louis, etc., Ry. Co. v. Standifer* (Ark.), 25 R. R. R. 377, 48 Am. & Eng. R. Cas., N. S., 377; third foot-note appended to *Southern Ry. Co. v. Carr* (C. C. A.), 24 R. R. R. 699, 47 Am. & Eng. R. Cas., N. S., 699.

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MILLER, P. The demurrer to the plaintiff's declaration was overruled by the court below, and its action thereon is not challenged here. The plaintiff, a day laborer employed by defendant in the construction of its railroad, in an action on the case seeks recovery of damages for injuries sustained by him on the evening of May 23, 1906, in leaping from a flat car of the construction train on which he was being carried by the defendant from his place of work to his boarding house. Along the line of the railroad was a derrick used in lifting stone, supported by two large wire guy ropes stretched over the track. The derrick had been there for some time, and the construction train had safely passed and repassed under these ropes many times. But on the outward trip on the day of the injury the train was flagged before reaching the derrick; and the conductor, who went forward to learn the cause, on returning announced, in the presence of the plaintiff and others on the flat car, that the guy ropes were too low. But after a delay of only a few moments the train passed on under the ropes without further interruption. The trouble occurred at the derrick in returning in the evening of the same day. The train was moving backward, the engine pushing the flat car, which passed safely under the first rope; but this rope was caught by the cab of the engine, pulling down the derrick and causing the second rope to fall upon and sweep the top of the flat car, and in order to avoid being dragged off by the rope the plaintiff was obliged to leap off the moving car near the tender, alighting on some rocks on a steep embankment, bruising himself and breaking three ribs, and, as he rolled down the embankment, the heel of his left shoe was caught on the track by the wheels of the engine and his foot mashed, resulting in amputation of part thereof.

The evidence is very incomplete and unsatisfactory, in not showing to whom the derrick belonged, how it was or had been employed, more of the particulars regarding the delay of the train in the afternoon of the day of the accident, how and by whom the ropes were elevated so as to allow the train to pass under them, in whose charge the derrick was, and what provision the defendant had made to keep its track clear at this point. The plaintiff evidently relied on proof of the obstruction alone as making out a case of presumptive negligence, regarding the other matters as defensive in nature. It is not generally true, however, as between master and servant, that negligence is imputed from the circumstance alone of injury due to defective appliances or machinery; but, as a general rule, some affirmative acts of negligence, either of omission or commission, must be shown. *Minty v. Railroad Co.*, 2 Hasb. (Idaho) 471, 21 Pac. 660, 4 L. R. A. 409; *Wood, Mast. & Serv.* § 382; *Railway Co.*

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v. Ledbetter, 34 Kan. 326, 8 Pac. 411; *Dobbins v. Brown*, 119 N. Y. 188, 23 N. E. 537; 2 Labatt, Mast. & Serv. §§ 833-835.

After the plaintiff had introduced evidence of the nature and cause of, and how he received, his injuries, developing the facts substantially as stated, the court sustained the defendant's motion to strike out his evidence and direct a verdict in its favor. The only question presented here is, was this action of the court erroneous? It is said by Judge Holt in *Robinson v. Railroad Co.*, 40 W. Va. 585, 21 S. E. 727: "If there is no evidence in any fairly appreciable degree tending to prove defendant's negligence, then the court, on motion, should instruct the jury to find for the defendant, and the court must decide when the case calls for such instruction, for to that extent it is a question of law arising out of the testimony; but if in the opinion of the court the evidence tends in a fairly appreciable degree, not by a mere scintilla, to prove negligence on the part of the defendant, then the question should be submitted to the jury." To the same effect are *Carrico v. Railway Co.*, 35 W. Va. 389, 14 S. E. 12, *Yeager v. Bluefield*, 40 W. Va. 484, 21 S. E. 752, and *Guinn v. Bowers*, 44 W. Va. 507, 29 S. E. 1027; a motion to exclude evidence being, according to these and other cases, equivalent to a demurrer thereto, so far at least as the rights of the plaintiff are concerned. Whether the evidence of the plaintiff comes within the rule of these cases depends upon the question whether the suspension of these cables over the track, so low at the time of the accident as to constitute an obstruction, of itself speaks a *prima facie* case of negligence, tending with the other evidence to support in an appreciable degree the plaintiff's case. It is familiar law that the obligation to provide the servant a reasonably safe place to work is a nonassignable duty, breach of which, though delegated to another, will render the master liable. Such a reasonably safe place to work has been extended, with respect to railroads, to the entire track over which the servant is required to pass in discharge of his duties (*Flannegan v. Railway Co.*, 40 W. Va. 436, 21 S. E. 1028, 52 Am. St. Rep. 896; *McCreery's Adm'x v. Railroad Co.*, 43 W. Va. 112, 27 S. E. 327; *Jackson v. Railroad Co.*, 43 W. Va. 380, 27 S. E. 278, 31 S. E. 258, 46 L. R. A. 337), and we see no reason for excepting railroads under construction.

This position does not violate the general rule, in the case of master and servant, requiring specific evidence which fairly tends to show the employer guilty of negligence. "The rule does not imply that it is only from direct evidence that the master's culpability can be inferred. The burden of proof is satisfied by the production of circumstantial evidence." 2 Labatt, Mast. & Serv. § 835. Does not the suspension of wire cables across a railroad track so low as to obstruct the track and the passage

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of a train, or leaving them so dangerously insecure as to be liable to become an obstruction and a nuisance, unexplained, actually obstructing the track but a short time before injury results, constitute per se negligence? This court has so held, and we think rightfully, in *McCreery's Adm'x v. Railway Co.*, *supra*, and substantially, also, in *Flannegan v. Railway Co.* and *Robinson v. Railway Co.*, *supra*. The courts of other states so hold. *Stoltenberg v. Railroad Co.*, 165 Pa. 377, 30 Atl. 980; *Railway Co. v. Delaney*, 22 Tex. Civ. App. 427, 55 S. W. 538; *Thomas v. Telegraph Co.*, 100 Mass. 156. Labatt, Mast. & Serv. § 836, says: "But, while the plaintiff is bound to introduce evidence from which the jury may properly infer that the accident was caused by the defendant's negligence, he is not required to point out the particular act or omission which caused the accident." In a note to section 838 are collected a number of cases illustrating the shifting of the burden of proof. This is not a case like *Sanderson v. Lumber Co.*, 50 W. Va. 42, 40 S. E. 368, 55 L. R. A. 908, 88 Am. St. Rep. 841, in which an employee of the defendant not directly connected with the management of a log train, but whose duty it was to ride on it in performance of his duties, was thrown off and injured by the reckless management of the train and engine. Here, as in *McCreery's Adm'x v. Railway Co.*, *supra*, there was an obstruction over the track, which the servant had the right to assume would be kept unobstructed, subjecting him to a danger not assumed—an obstruction which, until explained by the defendant consistently with nonnegligence, makes a *prima facie* case of negligence. The plaintiff was entitled to have his evidence go to the jury, and the motion to exclude it and direct a verdict for defendant was improperly sustained.

We therefore reverse the judgment, set aside the verdict, and award the plaintiff a new trial.

ST. LOUIS & S. F. R. CO. *v.* MORRIS.

(Supreme Court of Kansas, Dec. 7, 1907.)

[93 Pac. Rep. 153.]

Master and Servant—Injury to Servant—Appliances.*—Where the rules of a railroad company require the employees in case of danger to the company's property to unite to protect it, and where, in a case of apparent danger to such property, a conductor orders his brakeman to stop a moving car from which such danger by an impending collision with a pile driver may be fairly anticipated, the brakeman, if he has no knowledge or notice to the contrary, may act upon the assumption that such car is furnished with the ordinary and proper appliances for the safety of employees in performing their duties.

Same—Contributory Negligence.†—Where a master orders a servant into a situation of danger, and in obeying the command the servant is injured, he will not be charged with contributory negligence or with an assumption of the risk, unless the danger was so glaring that no prudent man would have encountered it, even under such orders, provided he acts with reasonable prudence in executing such orders.

Same—Evidence.—Whether the hazard is so great that a reasonably prudent man would not undertake the service required, and whether, when undertaken, the employee proceeded with reasonable care, are, where the evidence is conflicting as in this case, questions of fact for a jury, and the finding of a jury thereon, where proper instructions were given, must be sustained

(Syllabus by the Court.)

Error from District Court, Sedgwick County; Thos. C. Wilson, Judge.

*For the authorities in this series on the subject of the right of an employee to assume that his master has performed the duties owing to him, see second foot-note appended to *McCable v. Montana Cent. R. Co.* (Mont.), 13 R. R. R. 564, 36 Am. & Eng. R. Cas., N. S., 564, where all those preceding it are collected; foot-notes appended to *Southern Ry. Co. v. McGowan* (Ala.), 25 R. R. R. 353, 48 Am. & Eng. R. Cas., N. S., 353; *Indianapolis St. Ry. Co. v. Kane* (Ind.), 23 R. R. R. 151, 46 Am. & Eng. R. Cas., N. S., 151; foot-note appended to *Floan v. Chicago, etc., Ry. Co.* (Minn.), 23 R. R. R. 95, 46 Am. & Eng. R. Cas., N. S., 95.

†See extensive note, 12 R. R. R. 377, 35 Am. & Eng. R. Cas., N. S., 377; foot-notes appended to *Liles v. Fosburgh Lumber Co.* (N. Car.), 25 R. R. R. 517, 48 Am. & Eng. R. Cas., N. S., 517; *Wilson v. Southern Ry.* (S. Car.), 22 R. R. R. 548, 45 Am. & Eng. R. Cas., N. S., 548; foot-notes appended to *St. Louis, etc., R. Co. v. Mathis* (Ark.), 22 R. R. R. 538, 45 Am. & Eng. R. Cas., N. S., 538; foot-notes appended to *Drake v. San Antonio, etc., Ry. Co.* (Tex.), 20 R. R. R. 157, 43 Am. & Eng. R. Cas., N. S., 157.

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Action by H. J. Morris against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The plaintiff in the district court, H. J. Morris, suffered personal injuries causing the loss of his leg below the knee. The action was for damages for the injury. He alleged negligence on the part of the defendant company as follows: "In failing to provide suitable handholds and brakes and apparatus on the car which he was directed to handle, * * * and in carelessly handling said cars and sending plaintiff to a place of danger, and requiring him to act in an emergency without warning and without taking proper precaution against injuring him; * * * that paragraph 5 of the general rules of the Frisco System provided, 'in case of danger to the company's property, employees must unite to protect it'; * * * that punishment was provided for servants disobeying said rule; * * * that the plaintiff undertook to stop the moving car in question in accordance with, and in obedience to, said rules, and in accordance with his general duties as brakeman, and with the direction of the conductor of his train; * * * that the car which plaintiff tried to stop was a freight car, which was then and there in use by the work crew in charge thereof, and said car was without any proper handholds, brakes, or appliances usual and necessary for use by brakemen in handling, controlling, or stopping such car; that the hand brake had been removed therefrom and no air brake was accessible or available, and plaintiff first ascertained these facts when he reached the end of the car for the purpose of applying the brakes. * * * Plaintiff says that if the handholds or the brake itself had been on said car, in proper condition, he could have held the same and stopped the car, and saved himself, as well as defendant's property, from injury." The plaintiff was a brakeman on the local freight train of the defendant railroad company running from Wichita to Ellsworth. This train was standing on the main track at Burton, while the track in front or to the north was being cleared of flat cars, part of a work train consisting of a pile driver and accompanying tool cars and flat cars used in carrying piles. The pile driver and two tool cars stood on the side track west of the local train, and about two or three car lengths south of the engine of the latter. The engine of the work train was shoving a flat car from the main track about 400 feet north of the pile driver to the side track. The pile driver stood on this side track with the leads or guides in front, so that a car coming down the track from the north, if not stopped, would collide with these guides, and might injure the pile driver. On the west side of the side track, and just north of the pile driver, were piles to be loaded on the flat cars. When the engine had pushed the flat

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car past the connecting switch, and upon the side track, it was cut off by order of the conductor, and the car was left to roll down the track—there being a slight downgrade there—towards the guides of the pile driver. As the car passed by the side of the local train, the conductor and a brakeman of that train were walking along with it and on the east side of the moving car, thrusting blocks under the wheels endeavoring thereby to stop it, but apparently without success. It was moving at the rate of about four miles per hour. The plaintiff, Morris, passed around in front from the east side of the engine of the local train to the west side. As to what then occurred he testified as follows: "Just as I got there, I saw somebody about the car. Somebody had lost control of it, and was trying to stop it with chunks, and my conductor said, 'For God's sake, stop that car.' It was going towards the guides on the pile driver. I ran over. I thought the brake was laying down on the car, as they often do on flat cars, and, when I got around the end, I turned and grabbed for the brake. There was no brake, and I grabbed for the handhold, and there was no handhold, and I grabbed the chain, and it was still fastened to the brake rod, but disengaged from the lever, and it came all at once and I fell, and scrambled along a few feet, and I fell and caught this leg and crushed it right across there." The brake staff had been removed for convenience it seems in loading piles, and this was known to the conductor. The handhold had been broken off or removed in some way, but when the evidence does not show. There was an uncoupling rod with pin lever on that end of the car. The car was stopped immediately after the plaintiff was injured. The cries of the plaintiff attracted the attention of the trainmen, who found him just outside of the west rail, having pulled back the mangled leg before the second wheel could reach it. It appears that upon a former trial the plaintiff had testified that it was his purpose to steady himself by the handhold with one hand, and try to stop the car by pulling on the chain with the other, when, the chain coming "all at once," he stumbled and fell. On this trial on cross-examination he admitted that he had so testified, and that in taking hold of the chain he thought he could assist in stopping the car in that way; that it naturally came into his mind to do so; and that he was walking backward, pulling the chain, when he so stumbled and fell. In further explanation of the occurrence the plaintiff testified: "Q. Now, why did you go in to stop that car? A. Well, the rules demand that I should protect the company's property in case of danger to it, and my conductor ordered me to do so. Q. What property were you seeking to protect? A. Company's property. Q. What property? A. The pile driver, in particular. Q. What use did you seek to make of this handhold when you grabbed for it? A.

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To steady myself. Q. In what way? A. Well, just to keep from—that is what that is naturally therefor. Q. What is a handhold for? A. For that purpose, to steady yourself and to protect you from falling underneath the cars. Q. And working between the cars? A. And working between the cars. Q. Well, if there had been a handhold there, after you found there was no brake, what use could you have made of that handhold? A. Could have held myself up easily. * * * A. No; I got clear across the track and came up to the car, could see that the brake wasn't there just as I turned around and saw the beam there. It all came to me all at once. In looking for the brake staff, there the car came up to me, and I grabbed for what was there. No grab iron and no brake staff. * * * A. When I ran around the car, the first thing I looked for was the wheel on the outside of the end of the car, saw the wheel was not there, and naturally my eye would glance on toward the injured part of the car to see what the rest of the defects was, and, when it got closer up, I grabbed for the grab iron. Q. You had considered when you went there, whether the grab iron was there? A. I was considering it. In the impulse grabbed for the brake wheel. Grabbed for that; naturally would be the first thing that stuck out from the car. I glanced, and it was not there, and glanced along where the brake staff would have been laid, and seen the brake staff completely gone, and, as the car came up to me, I grabbed for the grab iron, and it was gone too, and the first thing my hand fell on was the chain. * * * Q. You did not attempt to step west of the car? A. Well, I attempted to shove myself away from the car. Q. How much? A. Of course, the car coming toward me nothing there to get hold of to spring against to get away, any more than putting your hand against a flat surface and shove yourself sideways from it. * * * Q. You say you lost your balance? A. Yes, sir. Q. How did you come to lose your balance? A. Naturally, when you come to the car, you take hold of the grab iron. There was no grab iron there, and I grabbed hold of the chain, and in order to use the chain to steady me, and lost my balance for the reason that the chain came all at once, and I fell down. Could probably have steadied myself much better if I hadn't grabbed hold of the chain, if I had thrown my hand against the car or something; but grabbed hold of the chain, and the whole chain coming—the whole thing being disconnected was really what lost my balance. Q. Is that the way you lost your balance? A. It is. Q. Cannot tell just how you lost your balance? A. Yes, sir. I grabbed the chain to steady myself. * * * Q. If that brake wheel had been bent down, would not the brake wheel have been west of the west line of the car? A. A few inches. Yes, sir. Q. Three inches west of the west alignment

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of the car? A. Yes, sir. Q. And to attempt to turn that brake wheel for the purpose of winding the brake chain and setting the brake shoes on the wheels upon it properly, and so as to take hold of the brake wheel with both hands to turn it? A. That is probably true; but there was piling laying outside the rail, so I could not walk along this piling and do that." The plaintiff noticed that the brake staff was not standing when he started around the car, but supposed that he would find it laying down. He had been in railroad service about ten years—three years as brakeman. The conductor, Sheuerhoff, testified that he did not give the order to stop the car, and the conductor and the brakeman of the work train testified that they did not hear such an order given, and the brakeman at the front wheels testified that he did not remember such an order. The conductor of the work train, and the plaintiff's fellow brakeman, testified that the plaintiff said, when they went to him after the injury, in response to an inquiry, that he had climbed on the brake beam, pulled the brake chain, and slipped and fell. The fireman of the local train said that, looking out of his cab window, he saw him climb on the car, pull the chain, and fall off. On the other hand, the brakeman who was at the front wheels on the opposite side of the car, and nearest to him said that plaintiff did not ride the brake beam, adding: "I do not think that he did."

The jury found for the plaintiff, assessing his damages at \$2,000, and returned the following findings: "Q. 1. When plaintiff first discovered the absence of the brake staff from the car, had he approached so near to the moving car that he could not safely attempt to get away from the car? A. Yes; could attempt, but not safely. Q. 2. When the plaintiff discovered the absence of the brake staff from the moving car, was the car moving more rapidly than plaintiff could walk? A. Yes; in his position. Q. 3. When the plaintiff discovered the absence of the brake staff from the moving car, did he attempt to get away from the car? A. Yes. Q. 4. If the foregoing question three is answered in the affirmative, then state in what manner the plaintiff attempted to get away from the car. A. By grabbing for handhold to steady himself. Q. 5. When plaintiff discovered the absence of the brake staff from the moving car, what distance was the car from the pile driver as near as you can determine from the evidence? A. 40 to 50 feet. Q. 6. When plaintiff discovered the absence of the brake staff from the moving car, did he take hold of the brake chain with his hand? A. Yes; to steady himself. Q. 7. When plaintiff discovered the absence of the brake staff from the moving car, did he take hold of the brake chain, and pull it? A. Yes. Q. 8. After plaintiff discovered the absence of the brake staff from the moving

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car, did he take hold of the brake chain intending to pull the chain while moving along in front of the car. A. No; to steady himself. Q. 9. When plaintiff took hold of the brake chain, did he at the same time discover that the handhold was not on the car? A. Yes; at the same time. Q. 10. When plaintiff pulled the brake chain, had he looked to see whether or not the handhold was on the car? A. Yes; at the same time. Q. 11. Did plaintiff lose his balance when he pulled on the brake chain? A. No; previous to that time. Q. 12. When plaintiff lost his balance, did he struggle to protect himself from falling in front of the car? A. Yes. Q. 13. Did plaintiff fall in front of the car while struggling to protect himself from such fall after he had pulled the brake chain? A. Yes."

A motion for judgment for the defendant on the findings was overruled. Also a motion for a new trial. The company assigns error upon these rulings; also upon the refusal of the court to give the following instruction: "The jury are instructed that, in order to justify a finding in this case against the defendant that it was negligence to omit having a handhold in the usual place on the end of the car when plaintiff attempted to stop said car, it must appear from the evidence to the satisfaction of the jury; (a) that it was bound to anticipate that its trainmen would seek to stop such a car by the use of the means adopted by the plaintiff in this case; (b) and that it was necessary that a handhold be provided in the usual place on the end of the car in order to protect such employee from injury while attempting to stop the car by such means; (c) and that it would be dangerous to attempt to stop the car by the use of such means without such handhold or some equivalent device being provided at the usual place of such handhold on the end of the car where such attempt might be expected to be made; (d) and that defendant failed to provide such handhold or any other device which could with reasonable safety be used for the purpose of protecting such employee from injury while attempting to stop the car by the use of the means adopted by the plaintiff in this case as shown by the evidence."

C. F. Parker, H. C. Sluss, and W. F. Evans, for plaintiff in error.

Houston & Brooks, for defendant in error.

BENSON, J. (after stating the facts as above). The first error specified by the defendant company is in refusing the instruction requested and quoted above. The instruction, if given, would have limited the province of the jury in determining the question of negligence to a situation where the company would be bound to anticipate just such an accident occurring in the precise manner that this occurred. This rule, if adopted, would

Chicago, I. & N. W.

upon the negligence of one O. C. Barker, of the defendant, as station agent in charge of the semaphore signal, alleged that on December 30, 1901, at Quincy, as a part of its railroad, a short distance north of the station, by a switch, which switch was a stand and other devices; that at the top certain painted windows, by the defendant as a means of operating its trains of the company, open or closed; that the switch was in the station house, and in the station, a semaphore signal, which, on December 30, 1901, was in charge of one A. L. Orrell, defendant for the purpose of the semaphore, and which signal was operating trains on the defendant's track was in good condition and whether said switch was open or closed were in full view from the station distant therefrom, and Orrell was engaged in his said employment; that said switch had been left open continuously, to the arrival of the train in charge of the defendant, was due to arrive, and the target of all the said time showed red, the switch was open and the main track unsafe; that before the arrival of trains, to the station, and examine the defendant's railroad, condition, and observe and note whether open or closed; and that at the arrival of Barker's train the target showed red, that the switch was open, and Orrell, in exercise of reasonable diligence would have noticed that the switch was open and could have raised the target in time to have enabled the decedent to stop before the same ran into said open switch, negligently and negligently set said semaphore to the decedent that said main track was clear, he well knew or might, with reasonable diligence, that said track was not clear and that the negligence and the display of said error of the decedent was misled and ran his train into the open switch, collided with other trains. In the paragraph there are sufficient averments to sustain at Quincy, within plain view of the station and station agent, a switch stand

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furnishing reasonably safe machinery, appliances, and surroundings. Thompson on Negligence, § 3765; Mo. Pac. Ry. Co. v. Barber, 44 Kan. 612, 24 Pac. 969. The order is considered to be an implied assurance that there is no abnormal danger. Labatt, Master & Servant, § 440c. Whether the plaintiff was negligent in the performance of the duty assigned to him must be determined in the light of the situation in which he was placed. If his act was such as a reasonably prudent man would have done, it was not negligent, although some other course would have been absolutely safe. Brinkmeier v. Railway Co., 69 Kan. 738, 77 Pac. 586. It must be remembered that this was a sudden call to a dangerous service which had to be performed then, or not at all. He was bound to use the discretion and judgment that a prudent man would in that situation. If it was a palpably reckless or foolhardy risk, he cannot be excused. If it was such as a prudent man would have performed, he might undertake it, although hazardous. The same rule applies to the manner in which the service was performed. Called to the service, he was bound to use such means as reasonable prudence dictated in the emergency in which he was placed. Whether he ought to have undertaken the work, and whether he made use of reasonable means in performing it, were questions properly submitted to the jury.

Labatt on Master & Servant, § 358, says: "In other cases the essence of the situation to be considered is that the servant was confronted by a serious danger; that he had not sufficient time to deliberate upon the comparative safety to the alternative courses of action open to him for the purpose of avoiding injury; and that the alarm or nervous excitement produced by the conjuncture impaired his reasoning faculties to such a degree that it was unjust to gauge the quality of his conduct by the ordinary standards. It is well settled that a servant who is suddenly exposed to great and imminent danger is not expected to act with that degree of prudence which would otherwise be obligatory; or, as the doctrine is also expressed, a servant is not necessarily chargeable with negligence because he failed to select the best means of escape in an emergency." Where a conductor ordered a brakeman to cut off cars from a moving train, it was held that, even if he was not directed to go in between the cars, he might nevertheless do so, if such a mode appeared to him, in the exercise of ordinary care to be necessary. Hannah v. Connecticut River Railroad, 154 Mass. 529, 28 N. E. 682. The same rule was applied when on a dark, stormy night a brakeman, who was required to act promptly, complied with an order to use a defective link. Denver, T. & G. R. Co. v. Simpson, 16 Colo. 55, 26 Pac. 339, 25 Am. St. Rep. 242. In Wurtenberger v. Railway Co., 68 Kan. 642, 75 Pac. 1049, it was held: "Where a master

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orders a servant into a situation of danger, and, in obeying the command, he is injured, the law will not charge him with contributory negligence, or with an assumption of risk, unless the danger was so glaring that no prudent man would have encountered it, even under orders from one having authority over him." In *Railroad Co. v. Langley*, 70 Kan. 453, 78 Pac. 858, it was said: "Again, where one, by the negligent act of another, is placed in a position of danger which requires immediate and rapid action, without time to deliberate as to the better course to pursue, he is not held to the strict accountability that is required of one situated in more favorable circumstances. Contributory negligence is not necessarily chargeable to one who fails to exercise the greatest prudence, or best judgment, in a case where he is required to act suddenly or in an emergency." The following cases are illustrative of the duties of a railroad company and its employees in similar cases: *Settle v. St. L. & S. F. Ry. Co.*, 127 Mo. 336, 30 S. W. 125, 48 Am. St. Rep. 633; *Fox v. C., St. P. & K. C. Ry. Co.*, 86 Iowa, 368, 53 N. W. 259, 17 L. R. A. 289; *Mason v. Railroad Co.*, 111 N. C. 482, 16 S. E. 698, 18 L. R. A. 845, 32 Am. St. Rep. 814; *Coates v. Boston & Maine Railroad*, 153 Mass. 297, 26 N. E. 864, 10 L. R. A. 769. The company by its rule required the plaintiff to unite with other employees to protect its property. He was suddenly called to that duty by his superior. He was not only bound to use ordinary care, but he was also bound to make all reasonable effort to save his employer's property. He was required to be loyal as well as to be careful.

The facts were fairly submitted to a jury, and, finding no error in the proceedings, the judgment is affirmed.

KATH v. EAST ST. LOUIS & SUBURBAN RY. CO.

(Supreme Court of Illinois, Dec. 17, 1907. Rehearing Denied Feb. 6, 1908.)

[83 N. E. Rep. 533.]

Master and Servant—Injury to Servant—Poles Near Railroad Track—Actions—Evidence.—In an action for the death of an electric railway conductor killed by coming in contact with a pole supporting the trolley wire, where evidence of measurements made several months after the accident was introduced to show the distance of the pole from the track, evidence that the pole had been moved further from the track after the accident and before the measurements were taken was admissible on the question of the pole's location at the time of the accident.

Same.—Evidence that a pole causing the death of an electric railway employee was crooked, and was placed nearer the track than others in the line, with the bend toward the track, is admissible, though the distance that such poles should be set from the railroad may be an engineering question.

Same—Risks Assumed by Servant—Obvious Dangers.*—Where a crooked pole set nearer the track than other poles supporting the trolley wire of an electric railway line leaned toward the track, and the ends of the ties on the side nearest it were rotten, so that the car in passing swayed towards the pole, an employee passing over the track daily for about eight months in the capacities of conductor and motorman must presumably have known the situation of the pole, and he assumed the risk of injury therefrom, since an experienced adult employee is chargeable with knowledge of the ordinary conditions under which the business in which he is employed is conducted, and is presumed to have notice of, and to have assumed, its ordinary hazards, such as are or ought to be obvious to a person of his experience and knowledge.

Same.†—An employee assumes all hazards due to defects which are obvious and known to him, if he continues in the employment without a promise from the master to remedy such defects, although they are the result of the master's negligence.

Trial—Instructions—Cure of Erroneous Instruction by Others.—A charge that a servant does not assume risks due to the master's own negligence states a rule directly in conflict with the correct one, and

*For the authorities in this series on the question whether railroad employees assume the risks from structures or objects over or near tracks, see foot-notes appended to *Southern Ry. Co. v. Carr* (C. C. A.), 24 R. R. R. 699, 47 Am. & Eng. R. Cas., N. S., 699.

†See foot-notes appended to *Kansas City, etc., Ry. Co. v. Loosley* (Kan.), 24 R. R. R. 712, 47 Am. & Eng. R. Cas., N. S., 712.

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is not cured by other charges giving the correct rule, since it is impossible to tell which charge the jury followed.

Master and Servant—Injury to Servant—Contributory Negligence—Choosing Extra Hazardous Method.—Where an electric car ran through a flock of chickens, and the conductor leaned out the side door to see the result and was struck by a pole and killed, when he might with safety have looked back through the empty car, he was guilty of negligence precluding a recovery against the master, since where there are two ways of performing an act, one safe and the other negligent, and the servant without coercion chooses the negligent one, there can be no recovery for a resulting injury.

Same—Questions of Law and Fact—Assumed Risk—Contributory Negligence.—While ordinarily the questions of assumed risk and contributory negligence are questions of fact, yet, where the facts and inferences to be drawn therefrom are admitted they may become questions of law.

Farmer, J., dissenting, and Carter and Vickers, JJ., dissenting in part.

Appeal from Appellate Court, Fourth District, on Appeal from Circuit Court, St. Clair County; R. D. W. Holder, Judge.

Action by Mary Kath, administratrix of Antone Kath, against the East St. Louis & Suburban Railway Company for the death of her intestate. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant appeals. Reversed and remanded.

This was an action on the case commenced in the circuit court of St. Clair county by the appellee against the appellant to recover damages for the death of her brother and intestate, alleged to have been caused by the negligence of the appellant. A trial resulted in a verdict and judgment in favor of the appellee for the sum of \$2,500, which judgment has been affirmed by the Appellate Court for the Fourth district, and a further appeal has been prosecuted to this court.

The declaration contained two counts, which alleged, in substance, that the defendant, on the 6th day of December, 1904, and for a long time prior thereto, was possessed of and operating a line of electric railway in Madison and St. Clair counties, on which railway the defendant was on the said date operating certain cars for the conveyance of passengers for hire; that along its said line of railway the defendant possessed and used a certain line of poles to support the arms to which were attached wires on which electricity was conducted for the purpose of operating its said cars; that on said day the plaintiff's intestate was in the employ of the defendant as a conductor on

†See second foot-note appended to *Southern Ry. Co. v. Gowan* (Ala.), 25 R. R. R. 352, 48 Am. & Eng. R. Cas., N. S., 352.

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one of its said cars on that part of its line of railway between Maryville and Edwardsville, in the county of Madison; that it was the duty of the defendant to use reasonable care to see that its road equipment and apparatus were in a reasonably safe condition, but the defendant, not regarding its duty in that behalf, negligently caused one of its said poles a short distance north of Maryville, in the county of Madison, to be placed too near the track, and negligently permitted said pole to incline inward toward the track, and negligently permitted a low place to be and remain under the rail adjacent to said pole, which said negligent location of said pole and said low place under said rail brought the cars passing over said track in dangerous proximity to the said pole, which said condition of said pole and track was known to the defendant, or should have been known to it by the use of ordinary care, but was not known to the plaintiff's intestate and could not have been discovered by him by the use of ordinary care, by reason whereof the plaintiff's intestate, while in the exercise of due care and caution for his own safety, in the performance of his duties as such conductor in charge of one of defendant's cars, in passing said pole on said line of railway, while looking out of said car in the performance of his duty, was struck by said pole and was thereby killed. The general issue was filed. At the close of all the evidence, the defendant requested the court to instruct the jury to return a verdict in its favor, which the court declined to do, and the action of the court in that regard has been assigned as error.

It appears from the evidence that Antone Kath, appellee's intestate, was on December 6, 1904, a conductor upon a car of the electric railway owned and operated by appellant, running from Edwardsville, in Madison county, to French Village, in St. Clair county. Appellant's cars were operated by means of what is called the "overhead trolley" system; that is, poles were set along and near to the track of appellant's railway, and from them arms extended out over the center of the track from which the trolley wire was suspended. Appellant's sheds were about a mile north of the village of Maryville, and in these sheds its cars were stored at night. French Village was about 10 miles south of these sheds, and between these sheds and French Village appellant operated a car daily, called the "French Village Special." This car would leave the sheds in the morning for French Village and take on minors along the route for the purpose of carrying them to the mines at or near French Village, where they were employed, and then return to the sheds, and in the evening it would return to French Village for the purpose of bringing the miners back from their places of employment to their homes. The deceased entered appellant's employment in April, 1904, as a motorman, and worked principally in that

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capacity but occasionally acted in the capacity of a conductor, and was so acting at the time he received the injury which caused his death. Walter Bruening was on that occasion acting as motorman. On the afternoon of December 6, 1904, Bruening, as motorman, and deceased, as conductor, were assigned to run the French Village Special. They were to take the car from the Maryville sheds and go to French Village for the purpose of bringing miners back to their places of residence along the line, after which they were to return the car to the sheds. They started from the sheds on the trip south without any passengers, and no one was on the car at the time of the accident except the motorman and the deceased. As they proceeded south from the sheds, both were riding on the front platform of the car. About a half mile south of the sheds, appellant's track crossed the public highway. A flock of chickens belonging to Mrs. Plaputnik, who lived near by, were on the crossing as the car approached it. The car ran through the flock and scattered them. As it did so, the deceased remarked to the motorman, "I bet you have got that rooster," and thereupon leaned out to the east from the car to look back at the crossing. The poles supporting the arms from which the trolley wires were suspended were on that side of the car, and one of them struck the deceased's head, fracturing his skull, from which injury he died.

Schaefer, Farmer & Kruger, for appellant.
Keefe & Sullivan, for appellee.

HAND, C. J. (after stating the facts as above). It is first contended by appellant that the court erred in allowing appellee to prove the pole which struck and injured deceased had been moved farther back from the track after the accident. If this testimony had been offered for the purpose of showing an implied admission of appellant that it was in the first place negligently set too near the track, it would have been incompetent, and its admission erroneous. *Howe v. Medaris*, 183 Ill. 288, 55 N. E. 724. No measurements appear to have been taken by any one as to the distance the pole was from the track at the time of the accident, until long after its occurrence. Appellee proved the distance between the pole and the track by witnesses who measured it in June after the accident. This appears to be the earliest date at which any measurement was taken. Appellee was allowed to prove that after the accident, and before these measurements were taken, the pole was moved farther away from the track. One witness testified for appellee that at the time he took the measurements, six months or more after the accident, the distance between the rail of appellant's track and the pole was three feet and eleven inches, and another witness that it was three feet and nine inches. Appellant caused meas-

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urements to be made in October after the accident, by its employees, who were present at the trial and testified to such measurements. Their measurements corresponded substantially with the measurements made by the witnesses for appellee. The question to be determined was the location of the pole at the time of the accident, and as it had been moved before any measurements were taken it was competent to prove that fact. Just how far it had been moved was not proven. One witness testified, "They put a hole behind the pole and shoved it back;" another, that "on the east side they made a hole and moved it over." We think, in view of the fact that the pole was moved before the measurements were taken, the evidence was competent.

It is next contended that the distance poles should be set from the track of railroads operated by electricity in the manner appellant's road was operated is an engineering question. The evidence in this case tended to show that the pole with which the appellee's intestate's head came in contact was crooked and was located nearer the track than other poles in the line, and that the crook or bend in the pole extended toward the track. If, therefore, it were conceded that the distance poles should be set from the track of a railroad operated by electricity is an engineering question, it cannot reasonably be contended that setting a crooked pole nearer to the track than others in the line, and with a crook or bend towards the track, is an engineering question. It is quite clear that if a straight pole be set four feet from the track, which appellant's evidence tends to show was the usual distance, there could be no necessity for setting a crooked one nearer to the track and allowing it to incline or lean in that direction.

It is further contended that the appellant's intestate assumed the risk of being injured in the manner in which he was injured, and that the court misdirected the jury as to the law upon the question of assumed risk. The evidence fairly tended to show that the pole with which Antone Kath came in contact was set nearer the track than the other poles in the line, and that it was crooked, so that the pole, some distance above the ground, leaned towards the track, and that opposite said pole the east ends of the ties were rotten, so that there was a sag in the track at that point. The deceased had passed over said track, while operating his car, at the point where he was injured, daily from April to December, 1904, and in the very nature of things must have known the situation of said pole and the condition of said track at that point, and, knowing said conditions, he assumed the risk of being injured therefrom. In *Camp Point Manf. Co. v. Ballou*, 71 Ill. 417, the doctrine was announced, which has been frequently reiterated by this court, that an employee can-

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not recover for an injury suffered in the course of the business in which he is engaged, from the defective condition of the machinery or appliances used therein, after he has knowledge of such defective condition, unless he continues his employment under a promise to repair, and it has repeatedly been held that an experienced adult employee is chargeable with knowledge of the ordinary conditions under which the business in which he is employed is conducted, and assumes its ordinary risks and hazards, and will be presumed to have notice of, and to have assumed, all such risks and hazards which to a person of his experience and knowledge are or ought to be patent and obvious (*Chicago & Eastern Illinois Railroad Co. v. Heerey*, 203 Ill. 492, 68 N. E. 74), and that an employee assumes all hazards which are obvious and apparent and which are known to him, although such conditions are produced as the result of the master's negligence, if he continues in his employment without a promise to remedy such defects (*Browne v. Siegel, Cooper & Co.*, 191 Ill. 226, 60 N. E. 815; *Elgin, Joliet & Eastern Railway Co. v. Myers*, 226 Ill. 358, 80 N. E. 897).

The court gave to the jury the following instruction upon the question of assumed risk: "The court instructs the jury that the servant only assumes the ordinary risks of the business—that is, the risks which are so open and obvious that they may be discovered by the servant by the use of ordinary care—and the servant also assumes such risks as are known to him; but the servant does not assume extraordinary risks which are unknown to him and which could not be discovered by the exercise of ordinary care, and he does not assume risks due to the master's own negligence." This instruction was clearly wrong, in that it informed the jury that the deceased did "not assume risks due to the master's own negligence," as the authorities uniformly hold that an employee assumes all risks connected with the business in which he is employed of which he has notice, even though they are produced by the negligence of the master, if he continues in the employment; and in the form in which this instruction was given it was not cured by the instructions of the defendant which gave the correct rule to the jury upon the question of assumed risks. It positively lays down a rule directly in conflict with the correct one, and it has frequently been said in such case it is impossible to say which instruction the jury followed. *City of Macon v. Holcomb*, 205 Ill. 643, 69 N. E. 79.

The appellee's intestate lost his life by reason of his head coming in contact with a trolley pole situated upon the east side of the track, while he was standing upon the front part of the car with his head projected beyond the east side of the car. Two witnesses, only, saw the accident, and they differ as to the po-

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sition in which the deceased stood at the time he was injured. The motorman testified the deceased stood upon the lower step upon the east side of the front part of the car; that he took hold of the car with his hands, and, facing the car, swung his body out from the car and looked towards the track in the rear of the moving car, and while in that position his head came in contact with the pole. Mrs. Plaputnik, who was at her house, some 100 feet west of the car, testified the deceased stood in the car and put his head out of the east front door of the car and looked toward the direction from which the car came, and while in that position his head came in contact with the pole, and he fell from the car. Whichever version is correct, it is apparent the deceased's head would not have come in contact with the pole had he not placed it outside of the car. The car was running at a high rate of speed, slightly downgrade, upon a straight track, in broad daylight. The deceased was familiar with the track and its surroundings, and knew that the standing pole was near the east side of the track. There was no one on the car, and, had the deceased desired to observe the effect of the car upon the flock of chickens, he might have looked out of the rear of the car. Instead of doing so, he put his head outside of the door of the car, and attempted to look up the track over which the car had passed. Whether he did this out of idle curiosity, as his remark to the motorman, "I bet you have got that rooster," would indicate, or whether he was attempting to see whether the rooster had been injured, to the end that he might report such injury, if any, to the railway company, as is contended by the appellee, will never be known. Suffice it to say that, where there are two ways of performing an act, one of which is safe, and the other negligent, and the servant, without coercion, chooses the negligent one, there can be no recovery if in performing the act he is injured. It has often been held that a master is not bound to take more care of a servant than the servant may reasonably be expected to take of himself. *Pennsylvania Co. v. Lynch*, 90 Ill. 333; *Missouri Furnace Co. v. Abend*, 107 Ill. 44, 47 Am. Rep. 425; *Karr Supply Co. v. Kroenig*, 167 Ill. 560, 47 N. E. 1051. The questions of assumed risk and contributory negligence are ordinarily questions of fact, but where the facts and the inferences to be drawn therefrom are admitted they may become questions of law. There is little, if any, conflict in the evidence in this case, and if the evidence of the appellee be taken to be absolutely true, clearly it shows such a disregard by the appellee's intestate for his own safety, that there exists no basis in the evidence upon which to rest a judgment against the appellant.

The judgments of the circuit and Appellate Courts will be reversed, and the cause remanded.

Reversed and remanded.

HIRST *v.* FITCHBURG & L. ST. RY. CO.

(Supreme Judicial Court of Massachusetts, Worcester, Oct. 15, 1907.)

[82 N. E. Rep. 10.]

Master and Servant—Street Railroads—Injuries to Third Persons.

—Where a police officer was not appointed as a railway policeman under Rev. Laws, c. 108, § 21 et seq., nor under St. 1906, p. 501, c. 463, § 49 et seq., making such corporations responsible for the acts of special railway policemen appointed on their petition, the railroad company was not liable thereunder for an assault committed by such policeman.

Same—Misconduct of Servant—Policeman.*—In an action for an assault committed on plaintiff by a policeman while plaintiff was visiting defendant's skating rink, evidence held to justify a finding that the policeman, at the time he committed the assault, was acting as defendant's servant, and not as a police officer.

Exceptions from Superior Court, Worcester County; William Cushing Wait, Judge.

Action by Alexander C. Hirst against the Fitchburg & Leominster Street Railway Company. A verdict was rendered in favor of plaintiff, and defendant brings exceptions. Overruled.

John F. McGrath, for plaintiff.

Chas. F. Baker, W. P. Hall, and Emerson W. Baker, for defendant.

MORTON, J. The sole question in this case is whether there was evidence warranting the jury in finding that Driesnack was acting as the servant of the defendant when he assaulted the plaintiff. Driesnack was a police officer of the town of Lunenburg and was on duty at Whalom Park in said town. The defendant operated a skating rink at said park. The alleged assault took place in the skating rink. Driesnack, who was called as a witness by the plaintiff, testified amongst other things, that he was taking tickets at the main entrance and saw something that looked like a disturbance in the skating rink, "and he im-

*See foot-note appended to *Higby v. Pennsylvania R. Co.* (Pa.), 13 R. R. R. 479, 36 Am. & Eng. R. Cas., N. S., 479; *Canon v. Sharon*, etc., Ry. Co. (Pa.), 25 R. R. R. 379, 48 Am. & Eng. R. Cas., N. S., 379; *Schmidt v. New Orleans Rys. Co.* (La.), 24 R. R. R. 156, 47 Am. & Eng. R. Cas., N. S., 156; foot-notes appended to *Sawyer v. Norfolk & S. R. Co.* (N. Car.), 25 R. R. R. 530, 48 Am. & Eng. R. Cas., N. S., 530; *Galveston*, etc., Ry. Co. *v.* *Currie* (Tex.), 25 R. R. R. 538, 48 Am. & Eng. R. Cas., N. S., 538.

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mediately left his post at the gate and went into the skating rink and pushed his way through the crowd and saw quite a disturbance there; that his purpose in leaving the ticket job was to restore order; that there was a large crowd" and "he pushed right into the center of it where the disturbance was and he saw it was necessary for him to pull his stick and he used it; that the one who was hit seemed to him to be causing * * * a disturbance; that after he hit the man he began to clean out the crowd; did not use the stick any more; that he got the crowd cleaned out and peace and order restored." This and other testimony in the case would, if believed, have warranted a finding that in doing what he did Driesnack was acting as a police officer to restore and preserve peace and order as his duty as a police officer required him to do, in which case the defendant would not have been liable for any assault committed by him even though it was committed upon its premises. But there was also evidence tending to show that notwithstanding he was a police officer of the town of Lunenburg he was in the employment of the defendant and that the assault was committed by him as such servant or employee. He was not so far as appears appointed a railway policeman under Rev. Laws, c. 108, § 21 et seq., or under St. 1906, p. 501, c. 463, § 49 et seq.; and neither those provisions nor the case of *Healey v. Lothrop*, 171 Mass. 263, 50 N. E. 540, relied on by the defendant, have anything to do with the case before us. Neither was there anything in the fact that he was a police officer of the town of Lunenburg to prevent his being employed by the defendant if it saw fit to employ him. He testified that he was employed and paid by it; that after the skating rink was built he collected tickets at the main entrance; and "that Memorial Day 1906 he did patrol duty in the forenoon and in the afternoon; 'they (meaning as could have been found, we think, the defendant) sent him to the skating rink', where he collected tickets," thus tending to show that he was subject to defendant's orders. He also testified that Manager Gile of the skating rink gave him instructions in regard to letting in disorderly persons and in regard to putting people out and that in quelling the disturbance he felt that it was his duty under his appointment and "under the managers of the rink to go in and see what they were doing." We do not see how it can be said that this testimony did not warrant the jury in finding, as they must have found, that he committed the assault as a servant of the defendant and not as a police officer. See *St. Louis, etc., Ry. Co. v. Hackett*, 58 Ark. 381, 24 S. W. 881, 41 Am. St. Rep. 105; *Dickson v. Waldron*, 135 Ind. 507, 34 N. E. 506, 35 N. E. 1, 24 L. R. A. 483, 488, 41 Am. St. Rep. 440. The case was left to the jury under instructions not objected to except on the ground that there was

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no evidence warranting a finding that the assault was the act of a servant or agent of the defendant. We think, as already observed, that there was such evidence, and that the exceptions must, therefore be overruled.

So ordered.

MCGREGOR v. OREGON R. CO.

(Supreme Court of Oregon, Jan. 28, 1908.)

[93 Pac. Rep. 465.]

Exceptions, Bill of—Amendment—Nunc Pro Tunc Order.—Where an original bill of exceptions as filed purported to contain the matters which were inadvertently omitted, the appellant, after argument of the appeal, and after notice given in the Supreme Court, was entitled to a nunc pro tunc order of the trial court amending the bill by inserting the omitted matter.

Same—Record of Trial—Presumptions.—Under B. & C. Comp. §§ 169-172, relating to the record of the trial and preparation of a bill of exceptions, it is presumed that the record was kept by the court, and that the court prepared the bill of exceptions, so that an oversight in omitting matter intended to be included in the bill is in law the error of the court, though it is the practice for the counsel to prepare and submit the bill of exceptions to the court for its approval.

Carriers—Loss of Freight—Action—Plea—Estoppel.—In an action against a carrier for loss of freight, a plea of estoppel by reason of plaintiff having received the bill of lading after loss, and having forwarded it to defendant with his claim for damages, was insufficient, where it alleged no facts showing that defendant acted on the contents of the bill of lading to its prejudice, or that it was misled by anything plaintiff did with reference thereto.

Same—Findings—Evidence—Limitation of Liability.—In an action against a carrier for loss of goods by fire, evidence held to support a finding that plaintiff never entered into a special contract, evidenced by a bill of lading limiting the carrier's liability.

Same—Execution after Loss.*—Where, after loss of goods while in the possession of a carrier, it executed and sent to the shipper a bill of lading limiting the carrier's liability as a matter of convenience for the purpose of identifying the property lost, the shipper's receipt of such bill did not limit the carrier's common-law liability.

Same.*—Mere notice by a carrier to a shipper is insufficient to limit the carrier's liability, an express stipulation being necessary for that purpose.

*See note at end of case.

McGregor v. Oregon R. Co**Same—Carrier's Liability—Warehousemen—Duty of Carrier.†—**

Where the consignee is present on the arrival of goods, he is required to receive them without unreasonable delay, or the carrier's liability as such is terminated. If the consignee is absent, but lives in the immediate vicinity of the place of delivery, the carrier must notify him of the arrival of the goods, after which he has a reasonable time to remove them; but if he is absent, unknown, or cannot be found, the carrier may place the goods in a warehouse, and after keeping them a reasonable time, if not delivered, the carrier's liability as such ceases.

Same—Reasonable Time.†—Plaintiff's agent learned of the arrival of the goods in question between 4 and 5 o'clock p. m., which was a few hours after the car in which the goods were transported reached destination. The shipping receipt had not arrived, and it was customary for the carrier's office to close at 6 p. m. Plaintiff did not remove the goods that night, during which they were destroyed by fire. Held, that the loss occurred before the expiration of a reasonable time for the removal of the goods as a matter of law.

Same—Question for Court or Jury.—Where the facts relating to the reasonableness of the opportunity offered to a consignee for the removal of goods after arrival are few and simple, and conclusively established, whether a reasonable time has or has not elapsed is a question for the court; it being proper to submit it to the jury only in case of a conflict in the testimony, or when the facts are doubtful or complicated, etc.

Same—Loss of Goods—Defenses—Pleading.—A defense by a carrier that part of the goods sued for did not belong to plaintiff could not be proved where not specially pleaded.

Same—Limitation of Liability—Burden of Proof.†—A carrier being ordinarily an insurer of the goods it undertakes to transport, and all limitations of its common-law liability being in the nature of exceptions to its general responsibility, the burden is on the carrier to

†For the authorities in this series on the question, when does the carrier's liability, as such, terminate after the arrival of the freight at its destination, see foot-note appended to *United Fruit Co. v. New York & Balt. Transp. Co.* (Md.), 26 R. R. R. 690, 49 Am. & Eng. R. Cas., N. S., 690; first foot-note appended to *Stapleton v. Grand Trunk Ry. Co.* (Mich.), 9 R. R. R. 332, 32 Am. & Eng. R. Cas., N. S., 332, where all the preceding authorities in this series are collected.

For the authorities in this series on the question, what is reasonable time within which to remove freight, see second foot-note appended to *United Fruit Co. v. New York & Balt. Transp. Co.* (Md.), 26 R. R. R. 690, 49 Am. & Eng. R. Cas., N. S., 690.

†For the authorities in this series on the subject of the burden of proof in actions against carriers of freight, see extensive note, 26 R. R. R. 298, 49 Am. & Eng. R. Cas., N. S., 298; *Fleischman, Morris & Co. v. Southern Ry. Co.* (S. Car.), 26 R. R. R. 258, 49 Am. & Eng. R. Cas., N. S., 258; *Cincinnati, etc., Ry. Co. v. Greening* (Ky.), 26 R. R. R. 235, 49 Am. & Eng. R. Cas., N. S., 235; *Central of Georgia Ry. Co. v. Jones* (Ala.), 25 R. R. R. 109, 48 Am. & Eng. R. Cas., N. S., 109;

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allege and prove a limited liability contract on which it seeks to relieve itself of its common-law liability.

Trial—Order of Proof.—Where, in an action against a carrier for loss of goods, it relied on a limited liability contract, defendant, though entitled to introduce such contract as a part of its case, had no right to introduce it as a part of plaintiff's cross-examination, or to ask plaintiff whether at any time prior to the shipment his attention was directed by the carrier's agent or by any one to any of the printed matter on the back of the contract.

Trial—Instructions—Requests—Instructions Already Given.—Requested instructions substantially covered by the general charge are properly refused.

Appeal from Circuit Court, Union County; T. H. Crawford, Judge.

Action by L. McGregor against the Oregon Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Arthur C. Spencer, Jas. G. Wilson, and W. W. Cotton, for appellant.

J. D. Slater, for respondent.

KING, C. This is an appeal by defendant from a judgment in favor of plaintiff for \$900 damages for the loss, by fire, of certain household goods and bar supplies, used by him in the hotel business. The goods were left by plaintiff for shipment with defendant's agent at North Powder, Or., on February 9, 1906, and directed to be shipped to him at Elgin in the county named, with the view of having them transported from there by wagon a distance of 60 miles into Wallowa county, to which place he was removing. The goods reached Elgin about noon on February 12th following, and were left in the car in which they were shipped in front of the Elgin Forwarding Company's warehouse, which, from causes unknown, took fire during the night and spread to the car near by containing plaintiff's freight, destroying the goods. It is alleged that no receipt, bill of lading, or other instrument in writing was issued to the shipper thereof at the time the goods were shipped, but conceded that a few days after the fire he received a bill of lading with plaintiff's name thereon, which had been signed by the defendant's agent, who claims he was authorized to do so by plaintiff.

Brennison v. Pennsylvania R. Co. (Minn.), 25 R. R. R. 105, 48 Am. & Eng. R. Cas., N. S., 105; foot-note appended to *Tiller & Smith v. Chicago, etc., Ry. Co.* (Iowa), 24 R. R. R. 581, 47 Am. & Eng. R. Cas., N. S., 581; *Louisville & N. R. Co. v. Brown* (Ky.), 24 R. R. R. 81, 47 Am. & Eng. R. Cas., N. S., 81; *Alexandre v. Atlantic Coast Line R. Co.* (N. Car.), 23 R. R. R. 485, 46 Am. & Eng. R. Cas., N. S., 485.

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After the argument, and after notice thereof having been given in this court, counsel for defendant applied to the court below for permission to have the bill of exceptions amended *nunc pro tunc* to include the bill of lading and other matters inadvertently overlooked in preparing the bill of exceptions in the first instance. After due notice of the proposed amended bill it was signed by the judge of the circuit court as of the same date as that of the first one filed. Counsel for plaintiff moves to strike this amended bill from the files, stating as a reason therefor that the lower court had no authority, power, or jurisdiction to authorize the amendment in the case after the term at which the action was tried had expired, and that the application to amend shows there was no mistake made by the court in signing or approving the original bill of exceptions, and that it appears that the defect arises merely from certain matters not having been included therein, but now desired, and that the oversight was that of counsel and not of the court. In *State v. Estes*, 34 Or. 196, 205, 51 Pac. 77, 52 Pac. 571, 572, 55 Pac. 25, Mr. Justice Wolverton, after observing that some states, including the United States Supreme Court, have adopted a rigid rule as respects amendments to a bill of exceptions after having been filed in the appellate courts, announces as a rule of this court that: "A bill of exceptions, once settled and signed and properly filed, becomes a part of the record in the case to which it relates, and stands precisely upon the same footing as any other record," and that "if, however, a bill of exceptions, through inadvertence or mistake, has been so made up as not to fairly and truly recite or represent what it purports to show as having actually transpired during the course of the proceedings, it may, by order of the court, entered *nunc pro tunc*, upon proper notice, be so amended at a subsequent term as that it will accord with the real facts;" further stating: "We incline strongly to the more liberal practice as being better suited to subserve the ends of justice, and are therefore constrained to adopt it." Measured by the rule thus announced, and finding that the original bill of exceptions as filed purports to contain the matters included in the bill as amended, it follows that the court, in approving and signing the amended bill of exceptions, acted within its powers. Nor could it be material that the oversight upon which the amended bill was sought appears to be that of the attorney. It is sufficient if it appears that the matters were omitted by the inadvertence of either the court or counsel preparing the bill; for, if omitted, it is to be presumed that the court overlooked it. Although it has become the practice, and a commendable one, for the counsel to prepare and submit the bill of exceptions to the court for its approval, yet, under B. & C. Comp. §§ 169-172, inclusive, it is presumed that the court keeps

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the record of the trial and prepares the bill of exceptions when the case may be appealed, from which it follows that from whatever cause the oversight may have occurred it is in law the error of the court before which the cause may have been tried, and on having its attention called thereto, after notice seasonably made to those interested, the court has power to correct the bill of exceptions so as to conform to the facts intended to be included therein. It clearly appears, however, from the amended bill presented, and the court's certificate appended thereto, that it is intended to supersede the original bill, and to include all matters to be considered here, and it will be so treated.

In this connection counsel for plaintiff urge that the bill of exceptions, on account of containing more than sufficient testimony to explain the errors assigned, and not having stated separately and distinctly the evidence intended to show the application of the rulings of the court, etc., does not come within the rule of this court, as required in *Hedin v. Suburban Ry. Co.*, 26 Or. 155, 37 Pac. 540, and subsequent decisions on the subject. Owing to the conclusion we have reached on the merits of the controversy, a consideration of this point becomes unnecessary. *Steiger v. Fronhofer*, 43 Or. 178, 72 Pac. 693. This action is based upon the common-law liability of the defendant, which, after denying any negligence on its part, sets up four defenses: (1) Exemption from liability, in case of fire, by special contract with plaintiff; (2) that, if liable at all, it is responsible as a warehouseman only; (3) that by a contract with plaintiff its liability is limited to \$5 per hundred weight for the household goods, and 50 cents per gallon for the liquors shipped, and that prior to the shipment the rates under which the goods were shipped had been established by the defendant for their transportation upon the character and value thereof, a higher rate being charged for goods shipped at the risk of the carrier, and a lower rate for goods shipped at the risk of the consignee; (4) estoppel by reason of plaintiff having subsequently received the bill of lading, and having forwarded it to defendant, with his claim for damages. The defense of estoppel was stricken out on motion of plaintiff as being sham, frivolous, redundant, and surplusage; but the other defenses were put in issue by the reply. It is urged first that the court erred in striking out the plea of estoppel. An examination of the averments discloses no facts alleged in support thereof, except such as might have been established under the other defenses relied upon. Again, the plea, as given, contains no allegation of facts showing that defendant acted upon the contents of the receipt or bill of lading to its prejudice, or that it was in any manner misled by anything done by plaintiff in reference thereto, all of which were essential to estop plaintiff from asserting his claim against the company. *Haun v. Martin*, 48 Or. 304, 86 Pac. 371. There is

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also testimony tending to show that plaintiff received no receipt, bill of lading, or other instrument from defendant until after the fire; that the shipment was made with no understanding between them in reference thereto or as to the contents thereof, all of which was submitted to and passed upon by the jury, as to which facts their verdict is conclusive. And there is testimony from which it could reasonably be inferred that the bill of lading was first wanted by the plaintiff and his agent in order that, by furnishing a means of identification thereof, they could more conveniently procure the goods from the agent at Elgin, and that, it was not forwarded to that point until after the loss occurred. McGregor denies ever signing the instrument, and his testimony is broad enough to indicate that no authority was given to any one else to affix his name thereto. When he presented to the company his claim for the loss, he sent no bill of lading, nor did he state upon what theory his claim was based—whether upon the common-law liability of the company as a common carrier, or upon the special and written contract. So far as disclosed by the record, this shipping receipt was sent to the company as a matter of convenience for the purpose of identifying the property lost. On receipt of the demand for damages from plaintiff's attorney the company requested that the shipping receipt be sent in conformity with their rules in such cases, and it was evidently sent under this request. The claim was disallowed by the company, the receipt returned to plaintiff's attorney, and this action brought, not under the special contract here relied upon by the company, but upon its common-law liability. In this respect this case is unlike those cited by appellant where the actions were brought upon the contract disclosed by the receipts, bill of lading, etc., and where an attempt is made at the trial to shift the character of the claim. It will be observed in the cases cited, in which this question was fully considered, that the shippers received their bills of lading at the time of the shipment, and not after the loss, as in this case, and that when so received they either expressly or impliedly ratified the contents thereof. There is evidence sufficient to support the findings of the jury to the effect that plaintiff never entered into the special contract claimed through the shipper's receipt, commonly known as the bill of lading, and the mere fact that he received it after the loss cannot avail defendant anything. There is a vast difference between consenting to the terms expressed in a bill of lading before the shipment, if such consent can be implied from the mere fact of receiving it without the signature of the consignor, and a case like the one at bar, where the jury has found that there was no consent to receive the bill of lading at some future time, nor to make the contract included therein. Many authorities hold that the acceptance of such receipt after

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the loss cannot be taken advantage of by the carrier, and that the shipper under such circumstances is not estopped from asserting his claim against the carrier under its common-law liability, among which are: 6 Am. & Eng. Ency. Law (2d Ed.) 642; *Baltimore & O. R. Co. v. Doyle*, 142 Fed. 669, 74 C. C. A. 245; *Gott v. Dinsmore*, 111 Mass. 45; *John Hood Co. v. Am. P. S. Co.*, 191 Mass. 27, 77 N. E. 638; *Bostwick v. Balt. & O. R. Co.*, 45 N. Y. 712; *American Ex. Co. v. Spellman*, 90 Ill. 455; *Phoenix Powder Mfg. Co. v. Wabash R. Co.*, 101 Mo. App. 442, 74 S. W. 492; *Allen, etc., Co. v. Can. Pac. Ry. Co.*, 42 Wash. 64, 84 Pac. 620. Under the verdict of the jury we must presume that plaintiff neither consented nor authorized his name to be signed to this receipt, and under the rule as substantially stated and recognized in this state in *Seller v. Steamship Pacific*, 1 Or. 409, Fed. Cas. No. 12,644, nothing short of an express stipulation will constitute such an agreement. It cannot depend upon implication or inference, nor conflicting and doubtful evidence, and mere notice to the shipper must be held insufficient. In that case the shipper, at the time of the delivery of the goods for transportation, and before they were transported, was handed a shipping receipt for the goods, which consisted of looking glasses, valued at \$450, and the receipt received by the owner thereof contained the words "not accountable for contents." This receipt the owner of the goods accepted without signing, and without being requested to do so, which fact was relied upon by the company as a defense in a suit brought by the owner for the recovery of the value of the goods which were injured in transportation, it being claimed as such defense that, under the law, it was the custom for the company to ship goods in this manner without the signatures of both parties thereto, and that this released the company from liability thereon; but in discussing this feature Mr. Justice Deady says: "The law, and not such a custom, ascertains and determines the rights and liabilities of shippers and common carriers. Such pretenses of custom as this appears to be, if allowed to modify the law of the land, would place it in the power of common carriers to make and unmake the law as they choose. I conclude, therefore, that these words, 'not responsible for contents,' amount to nothing, and in no way affect the rights of the shipper or the liability of the carrier. This being the case, and it appearing that the goods were 'received in good order,' the burden of proof lies on the carrier to show that the injury to the goods arose from the only exceptions to his liability. * * *"

It is urged that, since defendant had landed the goods at Elgin, and informed plaintiff's agent (Beals) that they were there and ready for delivery, and the latter, as agent of the plaintiff, had not removed them on the evening of the receipt of the notice.

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defendant thereafter became liable, if at all, as a warehouseman only. In this connection defendant claims that it was customary in that locality for defendant to unload from the cars on the track the goods of this class shipped to that point, which cars were usually placed in a certain locality for that purpose, and became what is known as "spotted," meaning that the car with its contents was thus placed preparatory to having the goods delivered therefrom, and that after the car reached its destination and was "spotted," and plaintiff's agent was apprised of these facts, the car, as a matter of fact, as well as of law, became a "warehouse on wheels," by reason of which it is maintained that its liability as a carrier then terminated. But whether the car became a warehouse as indicated or not the responsibility of defendant as a carrier continued until after the goods reached their destination and were either unloaded into a warehouse, or left in some other place equivalent thereto, and until plaintiff or his agent had a reasonable time to call for, examine, and remove them. "There is an irreconcilable conflict in the authorities," says Mr. Justice Wolverton, in *Normile v. Oregon Nav. Co.*, 41 Or. 177, 182, 69 Pac. 928, "as to when the duties of a common carrier cease and those of a warehouseman begin, where freight is carried to its destination, and unloaded, and put in a place usual and convenient for its reception by the shipper. Many of the authorities hold that the shipper must have a reasonable time after the arrival and deposit thereof in which to receive and take it away; some requiring notice to the shipper also, while others relieve the carrier at once upon the safe deposit and storage at the usual place, the same being convenient for its reception by the shipper." The owner of the property shipped should undoubtedly have the right, if he chooses, of preventing his goods from remaining stored in a warehouse subject to the warehouseman's liability only as such, and, unless the carriers can announce the exact time when the goods will reach their destination, this would be impossible. That much uncertainty always exists in this respect is universally recognized, and to insist that the consignee must be on hand at the precise moment of the arrival of his cargo, which might require days, and in some instances weeks, of constant waiting and watching at the depot, is, in effect, to force upon him what he should clearly be permitted to avoid by the use of reasonable diligence. The enforcement of the rule invoked by the defendant would make these unreasonable requirements of the shipper or consignee necessary, in order to avoid the extra risk of a probable loss that might occur in a warehouse, even if such loss should occur within an hour after the cargo is unloaded and placed there. And, as stated by Mr. Justice Cooley, in *McMillan v. M. S. & N. I. R. Co.*, 16 Mich. 79, 103, 93 Am. Dec. 208, cited with approval in

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Walters v. Detroit U. Ry., 139 Mich. 303, 305, 102 N. W. 1037: "To require the consignee to watch from day to day the arrival of trains, and to renew his inquiries respecting the consignment, seems to me to be imposing a burden upon him without in the least relieving the carrier. For it can hardly be doubted that it would be less burdensome to the carrier to be required to give notice than to be subjected to the numberless inquiries and examinations of his books, which would otherwise be necessary, especially at important points." In order, therefore, to avoid this burden, and at the same time impose diligence upon both the shipper and carrier without inconvenience to either, we find the weight of authority recognizes certain rules governing the delivery of the goods at their place of destination by the common carrier, which may be summarized as follows: If the person to whom the goods are shipped is present upon the arrival thereof, he must take them without unreasonable delay; if he is absent, but lives in the immediate vicinity of the place of delivery, the carrier should notify him of the arrival of the goods, after which he has a reasonable time to take and remove them; while, if he is absent, unknown, or cannot be found, then the carrier may place the goods in some warehouse, and, after keeping them a reasonable time, if the owner does not call for them, its liability as a common carrier ceases, but if, after the arrival, the consignee has a reasonable opportunity to remove them, and does not, he cannot hold the carrier as an insurer. The liability of the common carrier thus applied and limited, we believe to be consonant with public policy, and sufficiently convenient and practicable. Among the authorities in support of this position are: *Moses v. Boston & Maine Ry. Co.*, 32 N. H. 523, 64 Am. Dec. 381; *Walters v. Detroit United Ry. Co.*, 139 Mich. 303, 102 N. W. 745; *Hicks v. Wabash R. Co.*, 131 Iowa, 295, 108 N. W. 534, 8 L. R. A. (N. S.) 235; *L. L. & G. R. Co. v. Maris*, 16 Kan. 333; *Mo. Pac. Ry. Co. v. Grocery Co.*, 55 Kan. 525, 40 Pac. 899; *Normile v. Nor. Pac. Ry. Co.*, 36 Wash. 21, 77 Pac. 1087, 67 L. R. A. 271; *Burr v. Adams Ex. Co.*, 71 N. J. Law, 263, 58 Atl. 609; *Winslow v. Vt. & Mass. R. Co.*, 42 Vt. 700, 1 Am. Rep. 365; *Wood et al. v. Crocker*, 18 Wis. 345, 86 Am. Dec. 773.

But it is insisted by counsel for defendant that the question as to whether a reasonable time had elapsed after the arrival of the goods in which to permit plaintiff or his agent to remove them is, under the undisputed facts presented, one for the court and not for the jury to determine, and that the court erred in submitting the question to the jury. The rule on this point is clearly, concisely, and, we think, correctly, stated in *Lemke v. Chicago, M. & St. P. Ry. Co.*, 39 Wis. 449, 455, in which the court say: "The rule doubtless is that, whenever there is a conflict of testi-

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mony in respect to material facts bearing upon the question, or when the facts are doubtful or complicated and the court cannot satisfactorily determine their weight or importance, the question as to whether a reasonable time has or has not elapsed should be submitted to the jury, under proper instructions. But when, as in this case, the facts relating to the question are few and simple, and are conclusively established by a special finding, or by the undisputed evidence, it is for the court to say whether a reasonable time has or has not elapsed for the performance of a given act." In the case before us it is disclosed by the evidence that the plaintiff's agent learned of the arrival of the goods between the hours of 4 and 5 o'clock p. m., which was a few hours after the car in which the goods were transported reached Elgin; that the shipping receipt had not arrived; that it was customary for the office to close at the hour of 6; and that, after considering these facts, he decided to wait until morning. It becomes unnecessary, therefore, to determine here whether the question of the reasonableness of the time in this instance should have been submitted to the jury, for, if the question was properly submitted to the jury, they have found adversely to defendant, and their decision thereon is not, under the testimony, subject to review; but if, on the other hand, it is a question for the court's determination, it appears from the evidence that, after the arrival of the car, the time was so short in which the goods could have been delivered, together with the lateness of the hour when plaintiff's agent was informed of the arrival thereof, that the court, under such circumstances, would have been impelled to hold that the loss occurred before the expiration of the reasonable time to which plaintiff was entitled in which to remove the property, and it would have been imperative upon the court so to instruct the jury, leaving no change in the result. It is clear, therefore, that defendant is in no position to complain in this respect.

It is next insisted that the court erred in sustaining the objections to the interrogatories tending to show that a part of the goods lost were not the property of plaintiff. Defendant makes no attempt to plead that plaintiff is not the real party in interest. Such defense must be specially pleaded, in the absence of which, testimony of the character offered on this point is inadmissible; and no error was committed in sustaining the objection thereto. *Overholt v. Dietz*, 43 Or. 194, 72 Pac. 695.

It is maintained that the court erred in not permitting the defendant to introduce the bill of lading in evidence on cross-examination of plaintiff, and in not permitting him to ask the plaintiff on cross-examination whether at any time prior to the shipment his attention was directed by the agent of the Oregon Railroad & Navigation Company, or by any one, to any of the printed

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contents on the back of the receipt, which was received by him after the fire. The point intended to be raised by the bill of lading or receipt was that it constituted a special contract between the parties releasing the defendant from liability as an insurer, and for this purpose was at the proper time admissible in evidence. *West v. Washington & C. R. R. Co.*, 49 Or. —, 90 Pac. 666, 671. A common carrier is ordinarily considered and treated as an insurer of the goods it undertakes to transport, and all limitations of the common-law liability are in the nature of exceptions to its general responsibility, from which it follows that, in order to avoid such liability and rely upon a limitation contract, it devolves upon the carrier both to allege and prove it. *Normile v. Oregon Nav. Co.*, 41 Or. 177, 69 Pac. 928. This being an affirmable defense, and the burden of proof in this respect being upon the defendant, it follows that to have permitted him to go fully into this question on cross-examination would thereby have enabled him to have procured the advantage by prematurely making the witness his own, and at the same time, under the pretense of cross-examination, of depriving plaintiff of any cross-examination on the points thereby elicited. The court properly sustained the objection to this method of procedure. *Hildebrand v. United Artisans*, 49 Or. —, 91 Pac. 542.

A number of errors are assigned on account of instructions requested by defendant and refused by the court; but on examination we find the substance of the instructions requested, except to direct a verdict, were included in those given. Defendant was accordingly not prejudiced by the refusal to give the instructions in the form asked.

We find no error in the record detrimental to defendant, from which it follows that the judgment of the circuit court should be affirmed.

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Bills of Lading—How Far Conclusive.—See foot-notes appended to *Swedish-American Nat. Bank v. Chicago, etc., Ry. Co. (Minn.)*, 19 R. R. R. 783, 42 Am. & Eng. R. Cas., N. S., 783; second foot-note appended to *Pittsburg, etc., R. Co. v. American Tobacco Co. (Ky.)*, 25 R. R. R. 586, 48 Am. & Eng. R. Cas., N. S., 586.

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Carriage of Freight—Conflict of Oral and Written Agreements.—See extensive note, 13 Am. & Eng. R. Cas., N. S., 117, et seq.

Custom and Usage—Effect on Rights and Liabilities of Carriers.—See first foot-note appended to *Northern Pac. Ry. Co. v. Kempton (C. C. A.)*, 18 R. R. R. 542, 41 Am. & Eng. R. Cas., N. S., 542, where all the preceding authorities on the subject in this series are collected.

Limitation of Common Carrier's Liability—How Effected.—See generally foot-note appended to *Morse v. Canadian Pac. Ry. Co. (Me.)*, 9 R. R. R. 296, 32 Am. & Eng. R. Cas., N. S., 296, where all preceding authorities on the subject in this series are collected; second foot-note appended to *Powers Mercantile Co. v. Wells-Fargo & Co. (Minn.)*, 12 R. R. R. 504, 35 Am. & Eng. R. Cas., N. S., 504; foot-note appended to *Baltimore & O. R. Co. v. Doyle (C. C. A.)*, 24 R. R. R. 129, 47 Am. & Eng. R. Cas., N. S., 129; first foot-note appended to *McConnell v. Southern Ry. Co. (N. Car.)*, 23 R. R. R. 580, 46 Am. & Eng. R. Cas., N. S., 580; first foot-note appended to *St. Louis & S. F. R. Co. v. Phillips (Okl.)*, 22 R. R. R. 201, 45 Am. & Eng. R. Cas., N. S., 201, foot-note appended to *Russell v. Erie R. Co. (N. J.)*, 15 R. R. R. 699, 38 Am. & Eng. R. Cas., N. S., 699; third foot-note appended to *St. Louis, etc., Ry. Co. v. Marshall (Ark.)*, 16 R. R. R. 38, 39 Am. & Eng. R. Cas., N. S., 39.

Necessity of Consideration for Stipulation Limiting Carrier's Liability.—See second foot-note appended to *Cau v. Texas & Pac. Ry. Co. (U. S.)*, 13 R. R. R. 303, 36 Am. & Eng. R. Cas., N. S., 303; second foot-note appended to *Arthur v. Texas & Pac. Ry. Co. (U. S.)*, 23 R. R. R. 583, 46 Am. & Eng. R. Cas., N. S., 583; extensive note, 13 Am. & Eng. R. Cas., N. S., 168, et seq.

Reduced Rate as Consideration for Stipulation—Whether Shipper's Freedom of Choice between Rates Essential.—See foot-note appended to *Lake Erie & W. R. Co. v. Holland (Ind.)*, 9 R. R. R. 735, 32 Am. & Eng. R. Cas., N. S., 735, where all the preceding authorities on the subject in this series are collected; *Arthur v. Texas & Pac. Ry. Co. (U. S.)*, 23 R. R. R. 583, 46 Am. & Eng. R. Cas., N. S., 583; first foot-note appended to *St. Louis, etc., R. Co. v. Wells (Ark.)*, 22 R. R. R. 774, 45 Am. & Eng. R. Cas., N. S., 774.

Right of Carrier to Limit Its Liability by Special Contract for Losses Not Resulting from Negligence.—See extensive note, 20 Am. & Eng. R. Cas., N. S., 681, et seq.

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What Law Governs Contract Purporting to Limit Carrier's Liability.—See foot-note appended to *Cleveland, etc., Ry. Co. v. Druien* (Ky.), 11 R. R. R. 447, 34 Am. & Eng. R. Cas., N. S., 447, where all the preceding authorities on the subject in this series are collected; second foot-note appended to *Adams Express Co. v. Walker* (Ky.), 24 R. R. R. 145, 47 Am. & Eng. R. Cas., N. S., 145; first foot-note appended to *Lake Shore, etc., Ry. Co. v. Teeters* (Ind.), 24 R. R. R. 36, 47 Am. & Eng. R. Cas., N. S., 36.

When Stipulations Limiting Liability Inure to Benefit of Connecting Carrier.—See note, 7 Am. & Eng. R. Cas., N. S., 713, et seq.; *Mears v. New York, etc., R. Co.* (Conn.), 3 R. R. R. 668, 26 Am. & Eng. Cas., N. S., 668.

Where Initial Carrier's Liability Is Limited to Its Own Line.—See foot-notes appended to *St. Louis, etc., Ry. Co. v. Kilberry* (Ark.), 24 R. R. R. 567, 47 Am. & Eng. R. Cas., N. S., 567; *St. Louis, etc., R. Co. v. McGivney* (Okla.), 26 R. R. R. 702, 49 Am. & Eng. R. Cas., N. S., 702.

Whether Shipper's Acceptance of Contract Includes Assent to Its Terms.—See fourth foot-note appended to *Powers Mercantile Co. v. Wells-Fargo & Co.* (Minn.), 12 R. R. R. 504, 34 Am. & Eng. R. Cas., N. S., 504, where all the preceding authorities on the subject in this series are collected; first foot-note appended to *Central of Georgia Ry. Co. v. City Mills Co.* (Ga.), 27 R. R. R. 103, 50 Am. & Eng. R. Cas., N. S., 103; *De Wolff v. Adams Express Co.* (Ind.), 26 R. R. R. 611, 49 Am. & Eng. R. Cas., N. S., 611; first foot-note appended to *Wabash R. Co. v. Thomas* (Ill.), 25 R. R. R. 618, 48 Am. & Eng. R. Cas., N. S., 618.

I. PARTIES TO CONTRACT.

A. CONSIGNOR'S AUTHORITY TO BIND CONSIGNEE—PRESUMPTION.

In the absence of any knowledge to the contrary, the carrier has the right to assume that the consignor has authority to bind the consignee by entering into a special contract which limits the carrier's common-law liability; and the latter cannot repudiate a shipping contract made under such circumstances on the ground of absence of authority to contract in the consignor. *Edward Frohlich Glass Co. v. Pennsylvania Co.* (Mich.), 101 N. W. 223; *Mouton v. Louisville, etc., R. Co.*, 128 Ala. 537.

General Rule.—As a general rule, the consignor, as the agent to whom the owner intrusts his goods to be delivered to the carrier, must be regarded as having authority to stipulate for the terms of transportation. So held in *Ryan v. M., K. & T. Ry. Co.*, 65 Tex. 13, 57 Am. Rep. 589.

Authority to Ship.—Authority to ship the goods carries with it authority to accept the bill of lading and enter into a contract limiting the carrier's liability. So held in *Adams Express Co. v. Carnahan*, 29 Ind. App. 606.

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Consignor—Notice to Consignee—Presumption.—A contract of affreightment made by the consignor for the consignee is binding upon the latter, and, in the absence of fraud or mistake, he will be conclusively presumed to know its stipulations. So held in *Robinson v. Merchants' Despatch Trans. Co.*, 45 Iowa 470.

Vendor of Lumber Authorized to Deliver to Carrier and Superintend Shipment—Effect of Consignee's Mere Acceptance of Carrier's Offer Made by Letter.—In *Donovan v. Standard Oil Co.*, 155 N. Y. 112, 49 N. E. 678, it is held that when the agreement for the carriage of lumber on the great lakes is in the form of a letter addressed by a common carrier to the consignee of the freight, merely offering to carry lumber from the port of shipment to that of delivery during the season of navigation, at certain prices per thousand feet, and is silent as to all the conditions of the contract of shipment or charter party, with a simple acceptance of the offer, signed by the consignee, and the vendor of the lumber has been authorized by the consignee to deliver it to the carrier and superintend the shipment, the carrier may treat the vendor as having authority to bind the consignee by the usual contract of affreightment or bill of lading, and if, on shipping a cargo, the vendor and carrier execute a bill of lading in the usual form, exempting the carrier from liability for loss through perils of the sea, the consignee will be bound thereby.

Consignee Bound by Consignee's Selection of Car.—In *Edward Frohlich Glass Co. v. Pennsylvania Co. (Mich.)*, 101 N. W. 223, it appeared that, under an agreement between defendant and consignor, the latter was authorized to select cars for transportation of merchandise, and it selected a car, which had been delivered to it loaded with sand, for the shipment of a consignment of glass to plaintiff, and damage resulted by reason of the unsuitableness of the car. It was held that defendant was not liable to the consignee for negligently furnishing an unsuitable car, since, as against the railroad company, the consignee was bound by the consignor's selection under such agreement.

Firm Directed to Ship Certain Goods to Plaintiff.—In *Shelton v. Merchants' Dispatch Trans. Co.*, 59 N. Y. 258, it appeared that plaintiff directed C. & Co. to ship to him at J. certain goods by defendant's line. The goods were marked with plaintiff's address, delivered at defendant's depot, and receipts taken in a book kept for that purpose by C. & Co. No special contract for carriage was made at the time. After shipment of the packages, C. & Co., who had been large shippers by defendant's line, in accordance with an habitual course of dealing between them, sent the receipts to defendant's office and received bills of lading, the giving of which was entered upon the receipts. The bills of lading limited defendant's liability to its own line, which terminated at C. It was held that the bills of lading being taken by C. & Co. in the exercise of their original authority to

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contract, displaced the common-law relation between the parties and controlled their rights.

Receipt Delivered to Truckman of Shipper.—A receipt delivered to the truckman of a shipper by the carrier upon the receipt of goods, containing conditions with respect to the transportation thereof, if the only written evidence of the contract of shipment, is binding on consignee, although the shipper was ignorant of its terms. So held in *Merchant's Dispatch Transp. Co. v. Furthmann*, 47 Ill. App. 561.

Person Employed to Construct and Superintend Shipment of Glass Cases.—But in *Harriman v. The May Queen* (D. C.), Fed. Cas. No. 9481, it appeared that an individual residing in Philadelphia, Pa., was employed by a firm in Memphis, Tenn., to construct glass cases, and to superintend their shipment. It was held that this did not make him in a legal sense the shipper; and that he could not bind the owner of such freight by any contract he might enter into of so important a character as would exempt the vessel from the usual responsibilities of a common carrier.

Merchants of Whom Goods Were Purchased—Effect of Their Knowledge—Presumption of Lack of Authority.—The fact that the merchants of whom the goods were purchased knew of a clause in the receipt given by the carrier for them purporting to limit its liability, will not have such effect, without proof of authority from the owner of the freight to make such a contract with the carrier, and, in the absence of evidence, it will be presumed that the persons shipping had only authority to ship the goods with all the liabilities of the carrier attaching, without exceptions of any description. So held in *Merchants', etc., Transp. Co. v. Joesting*, 89 Ill. 152.

Storage Company Directed to Send Goods to Owner by Railroad—Sent to Depot by Cartmen, Accompanied by Complete Shipping Order.—Where the owner of goods held in storage directed the storage company to send them to him by railroad, and an officer of the storage company sent the box containing the goods by a cartman to the railroad station, accompanied by a complete shipping order, the agent of the railroad company had no right to assume that the cartman had the authority to alter or modify the terms of the shipping order. So held in *Russell v. Erie R. Co.* (N. J.), 15 R. R. R. 699, 39 Am. & Eng. R. Cas., N. S., 699, 59 Atl. 150, 70 N. J. L. 808, 812.

Bill of Lading Delivered to Shipper in New York—Transportation to Owner in Wisconsin—Loss by Lake Navigation Excepted.—In *Falvey v. Northern Transp. Co.*, 15 Wis. 129, 141, it is held that where the condition that the owner of goods assumed the risk of loss by lake navigation, and damage from unavoidable or accidental delay, was contained in a bill of lading delivered to the shipper in New York, but the owner of the goods lived in Wisconsin, and there was no proof that he ever assented to or had any knowledge of such condition, the court would hardly feel authorized to say that there was

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a special contract between the parties, by which the owner agreed to take any risk which the law would otherwise impose upon the carrier.

Duty of Carrier to Examine Authority of Person Delivering Goods.

—A common carrier receiving goods for transportation is not required by law to examine the authority of the person delivering them to make a contract limiting its liability. So held in *Moriartz v. Harnden's Express*, 1 Daly (N. Y.), 227.

B. CONSIGNOR BOUND BY ACT OF HIS AGENT.

As a general rule, the consignor is bound by the act of the person whom he authorizes to take goods to a depot and deliver them to the carrier in accepting a freight receipt or bill of lading purporting to restrict the carrier's common-law liability.

United States.—*Van Schaack v. Northern Transp. Co.*, 3 Biss. (U. S.), 394.

Indiana.—*Adams Express Co. v. Carnahan*, 29 Ind. App. 606.

Massachusetts.—*Squire v. New York Cent. R. Co.*, 98 Mass. 239, 93 Am. Dec. 162.

Missouri.—*Craycroft v. Atchison, etc.*, R. Co., 18 Mo. App. 487.

New Jersey.—*Russell v. Erie R. Co.*, 90 N. J. L. 808, 15 R. R. R. 699, 39 Am. & Eng. R. Cas., N. S., 699, 59 Atl. 150.

New York.—*Meyer v. Harnden's Express Co.*, 24 How. Pr. (N. Y.), 290; *Moriartz v. Harnden's Express Co.*, 1 Daly (N. Y.), 227; *Neison v. Hudson River R. Co.*, 48 N. Y. 498.

Texas.—*St. Louis S. W. R. Co. v. McIntyre* (Tex. Civ. App.), 82 S. W. 346.

Authority of Agent—Presumption.—The power of an agent of the owner of goods to bind the latter by a contract to restrict the liability of the carrier to whom the goods are delivered by the agent for transportation will be presumed. So held in *Craycroft v. Atchison, etc.*, R. Co., 18 Mo. App. 487.

Goods Left with Agent to Be Shipped—Carrier's Knowledge of Ownership.—Where the owner leaves goods with an agent to be shipped, he will be bound by the the agent's contract with the carrier, restricting the latter's liability, although the carrier knew who the owner of the freight was. So held in *Jennings v. Grand Trunk Ry. Co.*, 5 N. Y. Supp. 140, 23 N. Y. S. R. 15, 52 Hun 227.

Agent Employed by Owner to Attend to Care, Delivery and Transportation of Cattle—Reduced Rates.—In *Hill v. Boston, etc.*, R. Co., 144 Mass. 284, 28 Am. & Eng. R. Cas. 87, 10 N. E. 836, it appeared that cows belonging to A. were delivered to a common carrier by an agent of A., who was employed to attend to the care and transportation of the cattle, and who signed an agreement for their carriage by railroad, in which the value of each animal was estimated at a certain sum, and which provided that the owner of the stock

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should assume the risk of all loss or damage from any cause except from collision of trains, in which case the carrier should not be held liable for a greater sum than that specified in the agreement; that the freight rates were based upon and intended for cows only of the value specified, and that an additional rate would be charged for cows of greater value. One of the cows was killed by the negligence of the carrier, and not by a collision of trains. It was held that there could be a recovery only of the value of the cow as specified in the agreement, and that A. was bound by the agreement made by his agent.

Firm Directed by Owner to Send by Express—Firm's Clerk as Owner's Agent.—In *Soumet v. National Express Company*, 66 Barb. (N. Y.), 284, it appears that plaintiff having certain goods in the hands of a firm, directed that they should be sent to her by express; that the firm sent them to the express office of defendant by their clerk, who took a receipt therefor. It was held that the clerk was plaintiff's agent, and that his acceptance of such receipt bound her, in respect to its lawful limitations of the carrier's liability.

Drover Sent by Owner to Place of Purchase to Attend and Care for Stock to Destination.—In *Squire v. New York Cent. R. Co.*, 98 Mass. 239, 93 Am. Dec. 162, it appeared that J. S. & Co., copartners, bought hogs in Chicago, and sent a drover there to attend and take care of them to Boston; that at a certain point on the route they were discharged into the yard of a railroad company whose road ran thence to Albany; that cars were brought to the yard, and the drover was told by the superintendent of the yard that it was time for his hogs to be loaded, whereupon he told the employees of such company that they could proceed to load, and allowed them to load in his absence; that on his return he said to such servants that they were not suitable cars, but said nothing to the superintendent who was near by, and, without further remonstrance, suffered the cars to be attached to a train which was to start for Albany in ten or fifteen minutes, and went to a ticket office to procure a pass; that the ticket master gave him the pass, and handed to him at the same time a written contract, saying that he must sign it, and asked him to sign it with the name of J. S., which he did without express authority from his employers, not knowing or ascertaining the contents, but supposing it to be some contract required about the hogs; that this contract was signed also by the station agent, and set forth that it was made between the railroad company and J. S., that "the company transport live stock only at first class rates as per tariff," except in certain cases "where they transport them at a reduced rate in consideration of the owner or shipper assuming certain risks as specified below," and that, in consideration of the agreement of the company to transport to Albany "four car loads of hogs" at the reduced rate, the party of the second part agreed "to examine the cars in

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which said animals are to be carried," "to load, tranship and unload said stock at his own risk, the company furnishing the necessary laborers to assist," "to go or send some person or persons in the same train with said stock, to take charge of the same, who shall be carried free of charge," and, among other things, "to take the risks of injuries which the animals may receive in consequence of heat, suffocation or of being crowded." The train then started, and on the way the drover discovered that the hogs were suffering from suffocation, spoke to the conductor about their condition, and cut holes in the cars, but did not obtain sufficient ventilation. At Rochester the conductor pointed out the yardmaster, and the drover asked him to cause the hogs to be transferred to other cars, but, upon his reply that there were no other cars there, proceeded with the hogs to Albany, where some of them were found dead from suffocation. It was held that the railroad company was not liable for the value of the hogs so suffocated, as such contract was binding upon J. S. & Co.

Vendor Directed to Ship by Express.—In *Moriartz v. Harnden's Express*, 1 Daly (N. Y.), 227, it appeared that plaintiff bought goods of E. and gave directions to him to ship them by defendant express company. It was held that, under such directions, he had authority, so far at least as defendant was concerned, to make a contract limiting defendant's liability.

Bill of Lading Prepared and Accepted by Agent of Shippers—Exposure to Rain and Mud—Knowledge of Weather Conditions.—Where the shippers or their agents were present at the taking of their cotton on board of the boat, and knew, from the rain storm then prevailing, that the cotton must necessarily be exposed to the rain and mud, they could not recover from the owners of the boat, the amount of damages resulting from such exposure, where the agent of the shippers accepted the bill of lading, prepared by himself, containing the clause: "the boat not to be responsible for torn bagging, ropes or bands off, wet by rain, old damage or mud." So held in *Newman & Co. v. Smoker*, 25 La. Ann. 303.

Bill of Lading Given to His Agent Acted upon by Shipper—Inability of Agent to Read.—Where a shipper accepted and acted on a paper given to his agent as a bill of lading, and which contained a provision limiting the carrier's liability in case of loss, he cannot deny that such was the contract, on the ground that his agent was unable to read. So held in *Missouri, etc., Ry. Co. v. Patrick* (C. C. A.), 20 R. R. R. 483, 43 Am. & Eng. R. Cas., N. S., 483, 144 Fed. Rep. 632.

Goods Left in Charge of Workman of Manufacturers, by Purchaser, for Delivery to Carrier—Former Dealings.—But in *Buckland v. Adams Express Co.*, 97 Mass. 124, 93 Am. Dec. 68, it appeared that A. & B., copartners, purchased goods at a factory, left them in charge of a workman of the manufacturers to be delivered there to C., a com-

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mon carrier, but they gave no authority to the workman to make a special contract with C. for their carriage; that C. there received them and gave the workman a receipt for them which purported to limit the carrier's liability; that it had been the daily practice of C., for several weeks previous, to receive packages at the factory from the manufacturers and give similar receipts therefor; that it was the bookkeeper of the manufacturers that had charge of such receipts; and that C., at these visits to the factory, had as often as twice a week received packages from A. & B., for which one quarter of the time he had given similar receipts, not giving receipts at all the rest of the time. It was held that these facts did not show that A. & B. assented to any limitation of the carrier's liability with respect to the package delivered by the workman.

Person Directed by Owner to Deliver Goods to Carrier.—Common carriers may reasonably restrict their common-law liability, by notice brought home to the owner of the goods, before or at the time of delivery to them, if such notice is expressly or impliedly assented to by the owner; but such notice, given to a person who was simply directed by the owner to deliver the goods to the carrier, is not sufficient to bind the owner, in the absence of all knowledge of and assent to such notice on the part of the latter. So held in *Fillebrown v. Grand Trunk R. Co.*, 55 Me. 462, 92 Am. Dec. 606.

C. INITIAL CARRIER'S AUTHORITY TO BIND SHIPPER.

It has been held that the initial carrier has implied authority to act as the agent of the shipper in making a special contract limiting the liability of the connecting carrier, even in a degree not provided for in the original shipping contract. *Rawson v. Holland*, 59 N. Y. 611, 17 Am. Rep. 394.

Limiting Value—Mere Delivery of Receipt by Intermediate Carrier to Initial Carrier.—But the mere delivery by an intermediate carrier, to the carrier from whom he received the goods, of a receipt containing a condition that the value of the goods at the place of shipment shall govern in the event of loss, is not a contract made with the owner, and does not change the common-law rule as to the measure of damages in an action against the intermediate carrier for loss of the goods on its route. So held in *Lamb v. Camden, etc., T. Co.*, 2 Daly (N. Y.), 454.

Implied Authority of Initial Carrier to Enter into Special Contract with Next Carrier.—And in *Babcock v. Lake Shore, etc., Ry. Co.*, 49 N. Y. 491, it is held that where a common carrier has transported freight under a special contract limiting its common-law liability, and by which it undertook for an agreed compensation to carry it to the terminus of its route, and then deliver it to another carrier, no authority results from the relation or from the contract empowering it to enter into a special contract on behalf of the owner with the next carrier restricting the liability of the latter.

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II. EFFECT OF MERE NOTICE OF CARRIER'S INTENTION TO RESTRICT ITS LIABILITY.

A. GENERAL RULE.

It is generally held that a common carrier cannot limit its liability by giving a general notice of its intention not to undertake in the future to transport freight except under contracts restricting its liability in a specified manner or degree.

United States.—*Merriman v. The May Queen* (D. C.), Fed. Cas. No. 9,489; *Ormsby v. Union Pac. Ry. Co.* (C. C.), 4 Fed. Rep. 706, 2 McCrary (U. S.), 48.

Connecticut.—*Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539, 39 Am. Dec. 398; *Peck v. Weeks*, 34 Conn. 145.

Georgia.—*Central of Georgia Ry. Co. v. Lippman*, 110 Ga. 665, 18 Am. & Eng. R. Cas., N. S., 640; *Fish v. Chapman & Ross*, 2 Ga. 549, 46 Am. Dec. 393; *Georgia R. Co. v. Gann & Reaves*, 68 Ga. 350; *Rome R. Co. v. Sullivan*, 14 Ga. 277; *Southern Exp. Co. v. Purcell*, 37 Ga. 103, 92 Am. Dec. 53.

Illinois.—*Illinois Cent. R. Co. v. Frankenberg*, 54 Ill., 88, 5 Am. Rep. 92; *Western Transp. Co. v. Newhall*, 24 Ill. 466, 76 Am. Dec. 760.

Louisiana.—*Baldwin v. Collins*, 9 Rob. (La.), 468.

Maine.—*Fillebrown v. Grand Trunk R. Co.*, 55 Me. 462, 92 Am. Dec. 606; *Sager v. Portsmouth, etc., R. Co.*, 31 Me. 228, 50 Am. Dec. 659.

Maryland.—*Baltimore & O. R. Co. v. Brady*, 32 Md. 333.

Massachusetts.—*Gott v. Dinsmore*, 111 Mass. 45; *Judson v. Western R. Corp.*, 88 Mass. (6 Allen) 486, 83 Am. Dec. 646.

Michigan.—*McMilligan v. Michigan, etc., R. Co.*, 16 Mich. 79, 93 Am. Dec. 208.

Mississippi.—*Mobile & Ohio R. Co. v. Weiner*, 49 Miss. 725.

New Hampshire.—*Moses v. Boston & M. R. Co.*, 32 N. H. 523, 64 Am. Dec. 381.

New York.—*Blossom v. Dodd*, 43 N. Y. 264, 3 Am. Rep. 701; *Cole v. Goodwin*, 19 Wend. (N. Y. Sup. Ct. Rep.), 251, 32 Am. Dec. 470; *Dorr v. New Jersey Steam Nav. Co.*, 11 N. Y. 485, 62 Am. Dec. 125; *Slocum v. Fairchild*, 7 Hill (N. Y.), 292; *Camden & Amboy R. R. & Trans. Co. v. Burke*, 13 Wend. 611, 28 Am. Dec. 488.

Ohio.—*Davidson v. Graham*, 2 Ohio St. 131.

Texas.—*Ryan v. M., K. & T. Ry. Co.*, 65 Tex. 13, 57 Am. Rep. 589.

Vermont.—*Blumenthal v. Brainard*, 38 Vt. 402, 91 Am. Dec. 350; *Kimball v. Rutland & B. R. Co.*, 26 Vt. 247, 62 Am. & Dec. 567.

West Virginia.—*Brown v. Adams Exp. Co.*, 15 W. Va. 812.

Public notice given by a common carrier, that he will not be responsible for freight, or that it is at the owner's risk, will not vary the carrier's liability. So held in *Derwort v. Loomer*, 21 Conn. 244.

Accidental Loss.—A public notice will not discharge a common carrier from his legal liability to answer for an accidental loss or destruction of freight in its possession. So held in *Moses v. Boston & M. R. R.*, 24 N. H. 71, 55 Am. Dec. 222.

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Only by Express or Implied Contract.—A common carrier cannot relieve himself from any part of his common-law liability for the loss or destruction of property carried by him, except by express or implied contract with the shipper. So held in *Carpenter v. Baltimore & O. R. Co.* (Del. Sup'r Ct.), 20 R. R. R. 679, 43 Am. & Eng. R. Cas., N. S., 679, 64 Atl. 252.

Power of Carrier to Divest Itself of Liability—Mere Declaration.—One engaged in the occupation of a common carrier cannot, by declaring or stipulating that he shall not be so considered, divested itself of the liability attached to the fixed legal character of that occupation. So held in *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174.

Mere Act of Carrier.—A common carrier's liability may be restricted by an express agreement between the parties, but the carrier cannot do so by any act of its own. It requires the assent of the parties concerned, and this is not to be inferred or implied from a general notice to the public, nor is it to depend upon doubtful or conflicting evidence, but it should be specific and certain, leaving no room for controversy between the parties. So held in *Harriman v. The May Queen* (D. C.), Fed. Cas. No. 9, 481.

A common carrier cannot limit its common-law liability by its own act alone. So held in *Merchants', etc., Co. v. Theilbar*, 86 Ill. 71.

Depositing Freight in Warehouse at End of Route.—In *Feige v. Michigan Cent. R. Co.*, 62 Mich. 1, 28 N. W. 685, it is held that, in the absence of an express contract, or one fairly inferable from the nature of the business, the known necessities under which it is carried on, and the established usage upon the subject, a railway company cannot shift its responsibility as a common carrier to that of a warehouseman by depositing the goods in the warehouse at the end of the route.

At Owner's Risk in Carrier's Warehouses.—The defendant railroad gave public notice, which it offered to bring home to the knowledge of plaintiff, that all goods would be at the owner's risk in the company's warehouses, and that no responsibility would be admitted for any loss or injury except such as might result from fire from a locomotive, or from negligence of the agents of the railroad. Plaintiff's goods were delivered at the warehouse, with instructions to be forwarded presently, and were consumed in the warehouse by an accidental fire, not caused by a locomotive. It was held that defendant was liable for the value of the goods as a common carrier, notwithstanding the notice. So held in *Moses v. Boston & M. R. R.*, 24 N. H. 71, 55 Am. Dec. 222.

Baggage—At Owner's Risk.—Common carriers cannot restrict their common law liability, by a general notice that the "Baggage of passengers is at the risk of the owners." *Hollister v. Nowlen*, 19 Wend. (N. Y. Sup. Ct. Rep.) 234, 32 Am. Dec. 455.

General Notice—Effect of Knowledge of Initial Carrier.—In *Jud-*

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son *v. Western R. Corp.*, 88 Mass. (6 Allen), 486, 83 Am. Dec. 646, it is held that a common carrier cannot, by a general notice, exonerate itself entirely from its legal duty and liability for property which is delivered to it for carriage, or fix the amount beyond which it will not be held responsible, in case of injury or loss, although such property is delivered to it by another carrier, to whom the notice has been made known, and who received the same from the owner under an agreement to carry it over its own line, and then, as agent of the consignee, to send it forward by a carrier.

Carrier's Circulars—Valuation of Freight.—In *Lowenstein v. Lombard, Ayres & Co.*, 164 N. Y. 324, it is held that a statement on the carrier's circular, "insurance free when valuation declared before the sailing of the steamers," is not notice to a prospective shipper that an agent appointed by the carrier to make contracts for transportation has authority to insure only when the value of the shipment is so declared; since the announcement therein is not to be considered as the measure of the agent's authority in the absence of an express statement to that effect, but only as a general rule promulgated by the agent, which does not restrict him from departing from it in a special case.

Pamphlet Hanging in Railroad Office—Rules and Rates.—A pamphlet hanging in a railroad company's office, containing rules and rates with respect to freight, is not of itself constructive notice of its contents to a shipper of freight. So held in *Coupland v. Housatonic R. Co.*, 61 Conn. 531, 23 Atl. 870, 55 Am. & Eng. R. Cas. 380.

Valuation of Stock—Notice to Shipper of Adoption of Rule.—Notice to the shipper of the adoption of a rule, that the carrier will not transport live stock unless the shipper signs a special contract, limiting the liability of the carrier for loss or injury to the stock to \$100, does not create a contract by which such rule becomes binding upon the shipper. So held in *Chicago, etc., Ry. Co. v. Harmon*, 12 Ill. App. 54.

Dogs—Baggageman's Perquisites—Special Notice of Rule.—In *Cantling v. Hannibal, etc., R. Co.*, 54 Mo. 385, 14 Am. Rep. 476, it appeared that the owner, having a dog on a train, being informed by the brakeman and the baggage master that the animal was not allowed in the passenger car, placed it in charge of the baggage master, and paid him for its transportation; that by the printed regulations posted at various stations of the railroad "live animals" were "allowed as baggageman's perquisites." But no special notice of this rule was brought home to the owner of the dog. It was held that the railroad was liable for the loss of the dog by the baggageman.

Merchandise Received as Baggage—Effect of Printed Rules.—In *Minter v. Pacific R. R.*, 41 Mo. 503, 97 Am. Dec. 288, it appeared that a passenger delivered his trunk and a piece of carpeting to the carrier's baggage master and received a check for his trunk, but was told

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that no check was necessary for the carpet as it would go safely. It was held that the railroad company was liable for the loss of the carpet, although by its printed rules the baggage master was forbidden to receive as passenger's baggage articles of merchandise.

Rule Requiring Shippers to Load Freight upon Cars.—In *London, etc., v. Fire Ins. Co. v. Rome, etc., R. Co.*, 52 N. Y. S. R. 581, 68 Hun 598, 23 N. Y. Supp. 231, it appeared that a rule of defendant railroad required all shippers of hay, straw, or other heavy freight to unload it from the vehicle upon which it was delivered into the freight house at the station in question, when delivered there, and to load it upon the cars furnished by the company; and that the freight in suit consisted of hay and straw. It was held that if this rule was of any binding force, it at most only required shippers of the kinds of freight conveyed by it to furnish the necessary help to load the freight, and that it did not change defendant's relation to property delivered to and accepted by it for the sole purpose of being transported over its road.

Notice Posted in Sleeping Car.—Personal Property in Berths.—A sleeping car company cannot exempt itself from liability by posting in its car a notice disclaiming responsibility for personal property in berths, if the notice is not known to the passengers. So held in *Lewis v. New York Sleeping Car Co.*, 143 Mass. 267, 9 N. E. 615, 28 Am. & Eng. R. Cas. 148, 56 Am. Rep. 852.

Tariff of Special Rates Contained in Printed Table.—In *Baltimore & O. R. Co. v. Brady*, 32 Md. 333, it appeared that certain cattle were delivered to appellant for transportation; that the charges for carriage were paid in accordance with a tariff of special rates, under which, by the printed table, the carrier assumed no responsibility for loss or damage or delay to stock. Some of the cattle were killed on the route and others injured. The railroad claimed exemption from liability upon the ground that the transportation charges were paid under such tariff of special rates. It was held that this alone was not sufficient; that it was necessary to show that the owner of the cattle had notice or actual knowledge of those terms at the time, or before the delivery of the stock by him to the railroad, and that they were assented to by him.

Disclosure of Contents and Value of Packages.—Newspaper Publication of Notice.—The mere publication of a notice in one or more newspapers, no matter for how long a time, of an intention not to be responsible for particular articles unless their contents and value be disclosed, is not enough to release the carrier from responsibility, it being necessary to bring the notice home to the shipper. So held in *Baldwin v. Collins*, 9 Rob. (La.) 468.

Baggage of Theatrical Company.—Tickets at Company Rates.—Regulation of Southern Railroads.—In *Saunders v. Southern Ry. Co.* (C. C. A.), 11 R. R. R. 596, 34 Am. & Eng. R. Cas., N. S., 596, 128 Fed. Rep. 15, it appeared that plaintiff, who was manager of a theatrical

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company of fourteen members, through his advance agent, applied to defendant railroad company for rates for his company, baggage, and stage properties from Birmingham, Ala., to Lexington, Ky., by way of three other cities, where he desired to stop. He was told that by buying eighteen tickets at company rates he would be entitled to a car for the baggage and other properties free, which offer was accepted. A week later plaintiff bought the tickets from there to Atlanta, and was given the car. A regulation of defendant and other Southern railroads required from the purchaser in such cases a release exempting defendant from liability for "any loss or damage" to baggage. Neither plaintiff nor his agent was informed of such regulation, but his property man, after loading the car, was required to and did sign such release without plaintiff's knowledge. At Atlanta plaintiff again bought tickets through to Lexington, with stop-over privilege at the two other cities. He was not then told of the regulation, but was later asked to sign the release, and refused. His car was taken on, however, until the time he left the last point before reaching Lexington, where, on his refusal to sign the release, the car was held, and caused him to lose his engagement at Lexington. After twelve hours he signed the release under protest, and the car was forwarded. It was held that plaintiff was not bound by the regulation unless he had notice of it before the contract was completed by his purchase of tickets; that in the absence of actual notice, it could not be imputed to him through his property man; that it might be presumed from the generality of the regulation, the length of time it had been in force, and his experience in the business, but that under the evidence such presumption could not be drawn as matter of law, but was a question for the jury.

Printing Appended to or Indorsed upon Contract.—A railroad company cannot relieve itself from any of its obligations as a common carrier by mere notice, or by printing which is appended to or indorsed upon the shipping contract which is executed; and it can only be done by a stipulation in the body of the instrument, to which the shipper assents to by signing. So held in *Ormsby v. Union Pac. Ry. Co.* (C. C.), 4 Fed. Rep. 706, 2 McCrary (U. S.) 48.

Notice at Head of Express Receipt.—In *Fibel v. Livingston*, 64 Barb. (N. Y.), 179, it is held that a notice, at the head of a receipt given by an express company for freight, stating that shippers must have the value of their packages inserted in such receipt, otherwise the company will not be responsible for an amount over \$50, is insufficient to constitute a contract, where it is not proven to have been brought to the shipper's knowledge.

Memorandum on Freight Receipt.—In *Limburger v. Wescott*, 49 Barb. (N. Y.), 283, it is held that a common carrier cannot limit its liability by a memorandum or note on the card or ticket which he delivers on the receipt of goods to be transported by him.

Limiting Value—Printed Receipt.—A common carrier cannot limit

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its liability for the loss of goods by means of a printed receipt that it will not be liable beyond a specified sum. So held in *Southern Express Co. v. Armistead*, 50 Ala. 350. In this case it is said in the opinion: "The limitation was expressed in the body of the receipt, but the receipt was a printed one, and appears to have been such as was generally used by the appellant, without reference to the nature or value of the goods received. When such a limitation of liability is indiscriminately made, whether the goods be of great value, and put up in small compass, or of large bulk, and of value visibly beyond the limitation, no presumption of assent can, or ought to be indulged. It is more than questionable whether the law will permit a common carrier to make such a stipulation, except in a case where the shipper expressly agrees to it after being informed of some sufficient reason why the carrier is not compelled to carry the goods. *Southern Express Co. v. Caperton*, 44 Ala. 101, 4 Am. Rep. 118; *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. 318, 21 L. Ed. 297."

Duty to Carrier to Deliver beyond Its Own Line.—The common-law duty of a carrier receiving goods for transportation beyond its own line, to deliver at the point of final destination, cannot be restricted by mere notice; nor, under certain statutes of Illinois, by any stipulation or limitation expressed in its receipt given for the property. So held in *Chicago & N. W. Ry. Co. v. Simon*, 160 Ill. 648, 43 N. E. 596.

Printed Receipts Thrust upon Public during Press and Hurry of Railroad Travel.—A common carrier cannot restrict its liability by merely inserting conditions in its receipt for freight. To have this effect there must be a special contract assented to by the shipper. Public policy and fair dealing, on which the liability of a common carrier is founded, cannot be undermined and frustrated by artfully prepared printed receipts thrust upon the public, without the opportunity of fair assent, in the press and hurry of railroad travel. So held in *Levering v. Union Transp. & Ins. Co.*, 42 Mo. 88, 97 Am. Dec. 320.

Notice Printed on Back of Freight Receipt.—A notice purporting to restrict a common carrier's common-law liability printed on the back of its freight receipt forms no part of the shipping contract, and need not be noticed in the declaration, in an action against the carrier for loss or damage to the freight. So held in *Western Transp. Co. v. Newhall*, 24 Ill. 466, 76 Am. Dec. 760.

Same—Newspapers—Handbills—Comparative Effect.—No distinction can be made between a notice, purporting to limit the common-law liability of a common carrier, in the newspapers or by handbills, and one printed on the back of the receipt given for the freight; they all being equally ineffectual for the purpose intended. So held in *Western Transp. Co. v. Newhall*, 24 Ill. 466, 76 Am. Dec. 760.

Printed Form of Receipt Generally Used by Carrier.—A printed form of receipt, generally used by the carrier, but not used upon the

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occasion in question, and not shown to have been known to the shipper, does not raise the question of the power of a carrier to restrict his liability by contract. So held in *Southern Express Co. v. Womack*, 48 Tenn. 256.

Publication—Entry on Receipts or Tickets.—A common carrier cannot limit his legal liability by any notice given, either by publication, or by entry on receipts given on tickets sold. So held in *Central of Georgia Ry. Co. v. Hall* (Ga.), 19 R. R. R. 741, 42 Am. & Eng. R. Cas., N. S., 52 S. E. 679; *Southern Express Co. v. Barnes*, 36 Ga. 532.

Limiting Value of Baggage—"Notice to Passengers," in Fine Type, Attached to Contract Ticket.—In the *Majestic*, 166 U. S. 375, it appeared that by a printed contract the Oceanic steamship company agreed with the libelants, in consideration of the passage money paid, to land them with their luggage in New York; that the contract ticket had attached to it a "notice to passengers," printed in fine type, that the contract was made subject to "conditions," among which were the following: "Neither the ship owner nor the passage broker or Agent is responsible for loss or injury to the Passenger or his luggage or personal effects, or delay on the voyage, arising from * * *, barraty or negligence in navigation, of the steamer or of any other vessel. 4. Neither the ship owner nor the passage broker or agent is in any case liable for loss of or injury to or delay in delivery of luggage or personal effect of the passenger beyond the amount of £10, unless the value of the same in excess of that sum be declared at or before the issue of this contract ticket, and freight at current rates for every kind of property (* * *) is paid." It was held that by the rule in England the "conditions" were notices, and nothing more, and that it could not be held as matter of law that, whether they were regulations for the conduct of business, or limitations upon the common-law obligations, they constituted any part of the contract, and that the rule was not otherwise in the United States.

Statement on Back of Steamship Ticket—"See Back" at Bottom of Ticket.—In *Potter v. The Majestic* (C. C. A.), 60 Fed. Rep. 624, it appeared that a steamship ticket contained an agreement to carry a passenger and a certain quantity of baggage, and included several notices and directions, but did not refer to any other conditions. At the bottom were the words "See back," and on the back of the ticket was a statement that it was subject to several conditions, among which was one purporting to relieve the carrier from liability for perils of the sea. It was held that such condition was not binding, as it was an attempt to limit a common carrier's common-law liability by a mere notice not incorporated into the contract of carriage.

Loss of Trunk—Limiting Value—Receipt Given by Local Carrier to Girl.—In *Woodruff v. Sherrard*, 16 N. Y. Sup. Ct. Rep. (9 Hun),

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322, it appeared that plaintiff's daughter, in company with another young girl, delivered a check for her trunk to the clerk of the transfer company at its office in New York, with directions to transport the trunk to her house in Brooklyn; she then turned away and was leaving the office, but upon the suggestion of her companion that she ought to have a receipt, she returned to the desk and demanded a receipt of the clerk, who then gave her receipt, by which it was, among other things, stipulated that the company should not be liable to an amount exceeding \$100 unless a special contract was made. She did not read the receipt or know its contents until after the loss of the trunk. It was held that she never assented to the terms of the receipt purporting to limit the liability of the company, and that plaintiff was entitled to recover the full value of the trunk.

Check Accepted for Baggage After Its Theft—Limiting Value by General Notice—Application of Statute.—In *Williams v. Central R. Co.*, 93 N. Y. App. Div. Rep. 582, an action against a railroad company to recover damages for the negligent loss of plaintiff's trunk, it appeared that the company received the trunk at its station in New York city from an expressman; that plaintiff's assignor bought a ticket on defendant's railroad to Roselle, N. J., and that she then went to the baggage room and asked that her trunk be checked to her journey's end. The trunk could not be found, and plaintiff's assignor, desiring to take a certain train, accepted a check for her trunk on the promise of the baggage master to send it on to Roselle. She presented the check at Roselle, but it subsequently appeared that the trunk had been stolen from defendant's possession. It was held that under a statute of New Jersey, providing that any railroad company of that state might, by giving notice to persons tendering baggage to it, limit its liability as a carrier of such baggage to \$100 for each hundred weight of such baggage, unless such person should pay an additional charge, and that "a general notice of the limitation of the company's responsibility, placed in a conspicuous place, at or in the receiving office of such company, where goods, merchandise or baggage are usually received by them for transportation, and inserted in the bills of lading or receipts given for such goods or merchandise, and in the tickets delivered to passengers, shall be deemed sufficient notice under this section," did not apply, and that, assuming that the statute, did apply, the provision therein for a general notice to persons tendering baggage was insufficient.

Baggage—Notice Printed upon Face of Ticket.—The liability of a railroad company for the safe carriage of a passenger's baggage is not limited by a notice, printed upon the face of the passenger ticket issued by it, stating the terms upon which the baggage will be transported. So held in *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 212, 8 Am. Rep. 543.

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Same—Conditions in Fine Print on Passenger Ticket.—In *Hutchins v. Pennsylvania R. Co.* (N. Y.), 17 R. R. R. 685, 40 Am. & Eng. R. Cas., N. S., 685, 73 N. E. 972, it is held that the liability of a railroad company selling a ticket to a passenger to a point beyond its own line, for loss of baggage delivered to a connecting line in good order, is not limited by conditions in fine print on a ticket, providing that in checking baggage beyond its own line company restricts its liability to wearing apparel of a specified value, where there is no evidence that the passenger knew of such conditions and agreed to them.

To Insure Fair Dealing.—But a common carrier may, by notice alone, discharge itself from those duties designed merely to insure good faith and fair dealing. So held in *Erie Ry. Co. v. Wilcox*, 84 Ill. 239, 25 Am. Rep. 451.

Manner of Delivery—Contents of Parcels—Rates.—In *Harriman v. The May Queen* (D. C.), Fed. Cas. No. 9,481, it is held that a common carrier may restrict its liability by a general notice to the public, of any reasonable requisition to be observed, as to the manner of delivery, entry of parcels, information of contents, rates of freight and the like.

Nature and Value of Goods.—A common carrier cannot vary his responsibility by notice or special acceptance, such being void as contravening the policy of the law, but he may require the nature and value of the goods to be made known to him, and may avail himself of any fraudulent acts or sayings of the shipper's employees. So held in *Fish v. Chapman & Ross*, 2 Ga. 349, 46 Am. Dec. 393.

General Notice—Sufficiency.—But a general notice of limitation of a common carrier's liability must be such as to amount to actual notice, or shown to have been so conspicuous that the party sought to be affected by it could not have failed to have discovered it without gross negligence. So held in *Verner v. Sweitzer*, 32 Pa. St. 208.

B. BROUGHT TO SHIPPER'S NOTICE.

And it has been held that the mere fact that such a general notice was brought home to the shipper before or at the time he applied to have his goods transported is immaterial in this connection.

Connecticut.—*Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539, 39 Am. Dec. 398.

Illinois.—*Western Transp. Co. v. Newhall*, 24 Ill. 466, 76 Am. Dec. 760.

Massachusetts.—*Gott v. Dinsmore*, 111 Mass. 45.

Michigan.—*McMillan v. Michigan, etc., R. Co.*, 16 Mich. 79, 93 Am. Dec. 208.

Mississippi.—*Mobile & Ohio R. Co. v. Weiner*, 49 Miss. 725.

New Hampshire.—*Moses v. Boston & M. R. Co.*, 32 N. H. 523, 64 Am. Dec. 381.

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New York.—*Blossom v. Dodd*, 43 N. Y. 264, 3 Am. Rep. 701; *Dorr v. New Jersey Steam Nav. Co.*, 9 N. Y. Super. Ct. Rep. 136.

Vermont.—*Blumenthal v. Brainard*, 38 Vt. 402, 91 Am. Dec. 350; *Kimball v. Rutland & B. R. Co.*, 26 Vt. 247, 62 Am. Dec. 567.

West Virginia.—*Brown v. Adams Exp. Co.*, 15 W. Va. 812.

A common carrier cannot, by a mere general notice, even when it is brought to the knowledge of the shipper, limit its common-law responsibility, unless there is very clear proof that he expressly assented to such restriction, as forming the basis of the contract. So held in *Farmers' & Mechanics' Bank v. Champlain Trans. Co.*, 23 Vt. 186, 56 Am. Dec. 68.

A general notice by a carrier to the public purporting to limit its obligations as a common carrier affords no evidence of a special contract restricting such obligations, even if the existence and contents of the notice were brought home to the shipper. So held in *Blumenthal v. Brainard*, 38 Vt. 402, 91 Am. Dec. 350.

The common-law liability of common carriers cannot be limited by a mere notice brought home to the knowledge of the shipper. So held in *Moses v. Boston & M. R. Co.*, 32 N. H. 523, 64 Am. Dec. 381.

Express Assent.—The common-law liability of a common carrier cannot be limited by notice, even when it is brought home to the knowledge of the shipper, it being necessary to prove the express assent of the shipper to the limitation. So held in *Western Transp. Co. v. Newhall*, 24 Ill. 466, 76 Am. Dec. 760.

Notice Indorsed upon Freight Receipt—Posting of Notices—Evidence Aliunde.—A common carrier cannot restrict its common-law liability by a mere notice indorsed upon the receipt given the consignor, or otherwise brought to the consignor's notice. The assent of the latter to the limitation is necessary, and must be proved by evidence aliunde. It cannot be presumed from the terms of the receipt alone, or be implied from the posting of notices, or the delivery of a notice to the consignor. So held in *Michigan Cent. R. Co. v. Hale*, 6 Mich. 243.

Stage Baggage—At Owner's Risk.—The responsibility of proprietors of a stage coach for the baggage of a passenger cannot be limited by notice brought home to a passenger "that all baggage should be at the risk of the owner." So held in *Jones v. Voorhees*, 10 Ohio Rep. 145.

At Risk of Owners While in Carrier's Storehouses.—Where the defendants, who were common carriers, had printed upon their bills of freight tariff and their receipts, a notice "that all goods and merchandise will be at the risk of the owners while in the storehouses of the company," it was held that, in the absence of proof that the owners of goods delivered to defendants for carriage assented to such notice as limiting defendants' duties and obligations as common carriers in respect to such goods, such notice would have no effect to prevent the defendants from being liable for a loss of the goods, if

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the facts in other respects were such as to make them liable, though the owners had knowledge of such notice when the goods were delivered to the defendants. *Blumenthal v. Brainard*, 38 Vt. 402, 91 Am. Dec. 350.

Shipper's Knowledge That Rates Are Based on Value of Freight.—Mere knowledge of a shipper that the carrier's rates are based upon the value of the goods shipped will not lessen the liability of the carrier to answer for the real value of the goods, in the absence of the shipper's assent to such a restriction. So held in *Hayes v. Adams Express Co.* (N. J.), 23 R. R. R. 506, 46 Am. & Eng. R. Cas., N. S., 506.

C. ASSENT OF SHIPPER ESSENTIAL.

The rule which seems to be the best supported by authority is that a common carrier cannot restrict its responsibility in any particular by a general notice, unless such notice is brought to the knowledge of the shipper and he expressly or impliedly assents to such limitation.

United States.—*Ayres v. Western R. Corp.*, 14 Blatchf. (U. S.), 9; *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.), 318, 21 L. Ed. 297; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.), 344; *New York, etc., R. Co. v. Sayles* (C. C. A.), 87 Fed. Rep. 444; *Ormsby v. Union Pac. R. Co.* (C. C.), 4 Fed. Rep. 706, 2 McCrary (U. S.), 48; *Seller v. The Pacific, Deady* (U. S.), 17.

Alabama.—*Mobile, etc., R. Co. v. Jarboe*, 41 Ala. 644; *Southern Express Co. v. Armstead*, 50 Ala. 350; *Southern Express Co. v. Caperton*, 44 Ala. 101, 4 Am. Rep. 118; *Southern Express Co. v. Crook*, 44 Ala. 468, 4 Am. Rep. 140; *Steele v. Townsend*, 37 Ala. 247, 79 Am. Dec. 49.

Connecticut.—*Derwort v. Loomer*, 21 Conn. 244, 245; *Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539, 39 Am. Dec. 398; *Pack v. Weeks*, 34 Conn. 145.

Georgia.—*Fish v. Chapman & Ross*, 2 Ga. 349, 46 Am. Dec. 393; *Georgia R. Co. v. Gann & Reaves*, 68 Ga. 350; *Rome R. Co. v. Sullivan*, 14 Ga. 277.

Illinois.—*Chicago, etc., Ry. Co. v. Harmon*, 12 Ill. App. 54; *Illinois Cent. R. Co. v. Frankenberg*, 54 Ill. 88, 5 Am. Rep. 92; *Oppenheimer v. United States Express Co.*, 69 Ill. 62, 18 Am. Rep. 596; *Western Transp. Co. v. Newhall*, 24 Ill. 466, 76 Am. Dec. 640.

Indiana.—*Evansville, etc., R. Co. v. Young*, 28 Ind. 516; *Indianapolis, etc., R. Co. v. Cox*, 29 Ind. 360, 95 Am. Dec. 640.

Louisiana.—*Baldwin v. Collins*, 9 Rob. (La.), 468; *Logan v. Pontchartrain R. Co.*, 11 Rob. (La.), 24, 43 Am. Dec. 199; *New Orleans Mut. Ins. Co. v. New Orleans, etc., R. Co.*, 20 La. Ann. 302; *Roberts v. Riley*, 15 La. Ann. 103.

Maine.—*Fillebrown v. Grand Trunk R. Co.*, 55 Me. 462, 92 Am. Dec. 606; *Sager v. Portsmouth, etc., R. Co.*, 31 Me. 228, 50 Am. Dec. 659.

Maryland.—*Baltimore & O. R. Co. v. Brady*, 32 Md. 333; *Barney v. Prentiss*, 4 Harr. & J. (Md.), 317, 7 Am. Dec. 670.

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Massachusetts.—Gott *v.* Dinsmore, 111 Mass. 45; Judson *v.* Western R. Corp. (6 Allen), 88 Mass. 486, 83 Am. Dec. 646.

Michigan.—American Transp. Co. *v.* Moore, 5 Mich. 368; McMillan *v.* Michigan, etc., R. Co., 16 Mich. 79, 93 Am. Dec. 208; Michigan Cent. R. Co. *v.* Hale, 6 Mich. 243.

Mississippi.—Mobile & Ohio R. Co. *v.* Weiner, 49 Miss. 725.

Nebraska.—Atchison, etc., R. Co. *v.* Miller, 16 Neb. 661, 18 Am. & Eng. R. Cas. 545, 21 N. W. 451.

New Hampshire.—Bennett *v.* Dutton, 10 N. H. 481; Moses *v.* Boston & M. R. Co., 32 N. H. 523, 64 Am. Dec. 381.

New Jersey.—Gibbons *v.* Wade, 8 N. J. L. 255.

New York.—Dorr *v.* New Jersey Steam Nav. Co., 11 N. Y. 485, 62 Am. Dec. 125; Blossom *v.* Dodd, 43 N. Y. 264, 3 Am. Rep. 701; Camden, etc., R. Co. *v.* Belknap, 21 Wend. (N. Y.), 354; Cole *v.* Goodwin, 19 Wend. (N. Y.) 251, 32 Am. Dec. 470; Fibel *v.* Livingston, 64 Barb. (N. Y.) 179; Hollister *v.* Nowlen, 19 Wend. (N. Y. Sup. Ct. Rep.) 234, 32 Am. Dec. 455; Knell *v.* U. S., etc., Steamship Co., 33 N. Y. Super. Ct. 423; Limburger *v.* Wescott, 49 Barb. (N. Y.), 283; Prentice *v.* Decker, 49 Barb. (N. Y.) 21; Rawson *v.* Pennsylvania R. Co., 48 N. Y. 212, 8 Am. Rep. 543; Slocum *v.* Fairchild, 7 Hill (N. Y.), 292; Sunderland *v.* Wescott, 2 Sweeny (N. Y.) 260.

Ohio.—Davidson *v.* Graham, 2 Ohio St. 131; Gaines *v.* Union Transp., etc., Co., 28 Ohio St. 418; Jones *v.* Voorhees, 10 Ohio Rep. 145; Union Mut. Ins. Co. *v.* Indianapolis, etc., R. Co., 1 Disney (Ohio) 480.

South Carolina.—Levy *v.* Southern Express Co., 4 S. Car. 234; Patton *v.* Magrath, Dud. L. (S. Car.) 159, 31 Am. Dec. 552.

Tennessee.—Walker *v.* Skipwith, 19 Tenn. (Meigs) 502, 33 Am. Dec. 161.

Texas.—Ryan *v.* M., K. & T. Ry. Co., 65 Tex. 13, 57 Am. Rep. 589.

Vermont.—Blumenthal *v.* Brainard, 38 Vt. 402, 91 Am. Dec. 350; Farmers' & Mechanics' Bank *v.* Champlain Trans. Co., 23 Vt. 186, 56 Am. Dec. 68; Kimball *v.* Rutland & B. R. Co., 26 Vt. 247, 62 Am. Dec. 567; Mann *v.* Birchard, 40 Vt. 326; Winchell *v.* National Express Co., 64 Vt. 15, 23 Atl. 728.

West Virginia.—Brown *v.* Adams Exp. Co., 15 W. Va. 812.

General notices in relation to the liabilities of common carriers, are of no effect unless reduced to the form of a special stipulation, and signed by the party sending the goods, or be so brought home to his knowledge as to show his assent thereto, and be also just and reasonable. So held in *Southern Express Co. v. Crook*, 44 Ala. 468, 4 Am. Rep. 140.

A common carrier may limit its responsibility for property intrusted to it by a notice containing reasonable and suitable restrictions, if they are brought home to the owner of the goods delivered for transportation, and assented to clearly and unequivocally by him, if it also appears that the terms on which the carrier proposed to

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carry the goods were adopted as the contract between the parties. So held in *Gerry v. American Express Co.* (Me.), 21 R. R. R. 677, 44 Am. & Eng. R. Cas., N. S., 677.

Explicit Information to Shipper.—A common carrier who would, by virtue of a special contract, derogate from his common-law responsibility for freight, is bound to give explicit information to the other parties, of the precise limitation intended. So held in *Singleton v. Hilliard*, 1 Strob. (S. Car.), 203.

Limiting Liability to Own Line.—A common carrier may by express contract limit its liability to losses or damage occurring on his own route, but such limitation must be shown to have been brought to the notice of the consignor, and to have been accepted or acquiesced in by him. So held in *Louisville & N. R. Co. v. Meyer*, 78 Ala. 597, 27 Am. & Eng. R. Cas. 44.

Understanding and Deliberate Assent on Part of Shipper Essential.—To render a contract of shipment purporting to limit a common carrier's common-law liability binding upon the consignor, he must have understood the import of the receipts or other papers embodying the contract. To give any validity to the matter, it must have been deliberately assented to, with the knowledge and intent that it should be binding as a special contract and control the respective rights of the parties. So held in *Mobile & Ohio R. Co. v. Weiner*, 49 Miss. 725.

Posted Notices—Payment of Stage Fare and Entry on Waybill—Effect of Knowledge of Postmaster, to Whom Trunk Was Delivered.—In *Bean v. Green*, 12 Me. 422, it appeared that defendant established a stage line and posted notices "that he would not be accountable for any baggage, unless the fare was paid, and the same was entered on the way bill." It was held that this notice did not prevent defendant from being liable for the loss of a trunk through negligence, though the fare was not paid, knowledge of the notice not having been brought home to the owner of the trunk or his servant who carried it to the stage office; and that a knowledge of such notice by the postmaster, to whom the trunk was delivered by the plaintiff's servant, to be delivered to the stage driver, would not affect the owner of the trunk, such knowledge, not having been communicated to him by the postmaster, or to his servant.

Arrangement between Express Company and Railroad.—Public policy demands that the right of the owners of freight to absolute security against the negligence of the carrier, and of all persons engaged in performing his duty, shall not be taken away by any condition in the carrier's receipt for the freight, or by any arrangement between and the performing carrier. So held in *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174.

Arrangement between Carrier and Its Employee—Payment of Employee.—Any arrangement made between a carrier and its servant, by which the employee is to be paid for the carriage of particular par-

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cels, will not exempt the carrier from liability for the loss of them, unless such arrangement is known to the owner of the parcels, so that he contracts with the servant exclusively. So held in *Mayall v. Boston & M. R. R.*, 19 N. H. 122, 49 Am. Dec. 142.

Goods Other than Baggage at Owner's Risk—Regulations of Stage Line and Instructions to Agents.—When a stage proprietor has habitually carried in his coaches persons and baggage or packages, the regulations of his line and instructions to his agents not to receive goods for transportation, except as the baggage of passengers or in the care of passengers, except at the risk of the owner or of the person sending them, will not restrict his liability for goods received by his agents, unless the owner of the goods or his agent was notified of the rule or instructions at the time of the receipt of the goods. So held in *Walker v. Skipwith*, 19 Tenn. (Meigs), 502, 33 Am. Dec. 161.

All Baggage at Owner's Risk.—Public notice given by a railroad company that all baggage is at the risk of the owner, not brought home to the owner, will not exonerate the company from liability as carriers. So held in *Logan v. Pontchartrain R. Co.*, 11 Rcb. (La.) 24, 43 Am. Dec. 199.

Limiting Liability to Own Line—Trade Usage.—Common carriers employed in the transportation of goods on the Hudson river, between New York and Albany, and giving an acceptance of the same, without limiting their responsibility to Albany, are liable for the loss of the goods happening after their delivery at Albany to other forwarders, although such delivery be conformable to the usage of the trade, if knowledge of such usage be not brought home to the owner of the goods. So held in *St. John v. Van Santvoord*, 25 Wend. 660.

Bill of Lading.—Stipulations in a bill of lading purporting to limit a carrier's liability do not bind the shipper unless he accepted the bill of lading and understood and assented to such provisions. So held in *Chicago, etc., R. Co. v. Davis*, 159 Ill. 53, 42 N. E. 382.

Limiting Value—Voucher Given to Shipper.—On delivering to a common carrier a drop curtain of ordinary character and value, the shipper received as a voucher therefor an instrument in which it was stated that when the shipper omits to declare the value of the goods, he agrees that the value does not exceed \$50. It was held that the responsibility of the carrier for the real value in case of loss was not thereby restricted, unless the shipper had knowledge of the stipulation; and his knowledge that the carrier's charges depend on the value of the goods is not sufficient to render the restriction valid. *Hayes v. Adams Express Co.* (N. J.), 23 R. R. R. 506, 46 Am. & Eng. R. Cas., N. S., 506.

Limiting Value—Express Receipt.—In *Malone v. Metropolitan Express Co.* (N. Y. Sup. Ct.), 86 N. Y. Supp. 1039, it appeared that plaintiff, when accepting defendant's receipt for her trunk, did not know that it embraced a proposal for a special contract, and took it simply

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as a receipt to enable her to trace her property. It was held that defendant was not exempt from liability for loss of the trunk, in excess of the sum limited in the receipt.

Limiting Value—Almost Illegible Abbreviations Inserted in Bill of Lading by Carrier.—Where it is expressly provided in a bill of lading that "in the event of loss or damage under the provisions of this agreement, the value or cost at the point of shipment shall govern the same," the insertion by the carrier, without the knowledge or consent of the shipper, of almost illegible abbreviations which are interpreted by the carrier to mean "leaks and outs excepted \$20 railroad valuation," will not bind the shipper, and he may recover the actual value of the goods at the point of shipment. So held in *Rosenfeld v. Peoria, etc., Ry. Co.*, 103 Ind. 121, 2 N. E. 344, 21 Am. & Eng. R. Cas. 87.

Printed on Back or Stamped Across Face of Bill of Lading.—In *Doyle v. Baltimore & O. R. Co.* (C. C.), 126 Fed. Rep. 841, it is held that a railroad company, as a common carrier, cannot restrict its liability for goods lost in transit through its negligence, by any regulation or provision printed on the back or stamped across the face of the bill of lading, unless the shipper assents to it or it is distinctly brought to his attention.

Unsigned General Notice Printed on Back of Freight Receipt—Parties Not on Equality.—In *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, 18 Wall. (U. S.), 318, 21 L. Ed. 297, it is held that although a common carrier may limit its common-law liability by special contract assented to by the consignor of the goods, an unsigned general notice printed on the back of a receipt does not amount to such a contract, though the receipt with such notice on it may have been taken by the consignor without dissent. In this case it is said in the opinion: That it was "against the policy of the law and a serious injury to commerce to allow the carrier to say that the shipper of merchandise assents to the terms proposed in a notice, whether it be general to the public, or special to a particular person, merely because he does not expressly dissent from them. If the parties were on an equality in their dealings with each other, there might be some show of reason for assuming acquiescence from silence, but in the nature of the case, this equality does not exist, and therefore every intentment should be made in favor of the shipper when he takes a receipt for his property, with restrictive conditions annexed, and says nothing, that he intends to rely upon the law for the security of his rights."

Clause Impressed in Red Ink upon Corner of Freight Receipt.—A clause purporting to limit the carrier's liability, impressed in red ink upon one corner of the paper upon which a freight receipt is printed in black ink, and at right angles to the text of the receipt, is no part of the contract, unless so brought to the knowledge of the shipper as to imply his assent thereto on his acceptance of the receipt. So

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held in *New York, etc., R. Co. v. Sayles* (C. C. A.), 87 Fed. Rep. 444.

Inconspicuous Condition in Bill of Lading.—In *Baltimore & O. R. Co. v. Doyle* (C. C. A.), 142 Fed. Rep. 669, it is held that a common carrier cannot relieve itself from any portion of its common-law liability for the loss or destruction of goods in shipment, except by express or implied contract with the shipper, and in the absence of an express agreement no contract to that end will be implied from any condition or regulation contained in a bill of lading not within the general knowledge of the shipper, unless clearly and distinctly brought to his attention at the time of the shipment; and that there is no presumption, either of law or fact that he had knowledge of such condition where there is nothing in its position or the color or style of type in which it is printed to render it conspicuous; and the question of actual knowledge in such case is one of fact for the jury.

Limiting Value—Baggage—Railroad Ticket.—A limitation inserted in a railroad ticket, purporting to limit the liability of the company to \$100 in case of loss of baggage checked by virtue of the purchase of the ticket, is not binding on the purchaser of the ticket, unless, with knowledge of the limitation, he agrees to it. *Kansas City, etc., R. Co. v. Rodebaugh*, 38 Kan. 45, 15 Pac. 899, 34 Am. & Eng. R. Cas. 219.

Baggage Receipt of Local Carrier.—In *Strong v. Long Island R. Co.*, 91 N. Y. App. Div. Rep. 442, an action against the D. L. & W. R. Co. and the Long Island R. Co., for injuries to articles contained in a trunk owned by plaintiff, it appeared that he delivered the trunk with its contents in perfect condition to the D. L. & W. R. Co. and saw it placed on a train which arrived in New York at twelve-fifteen P. M. on July second; that at three-thirty P. M. on that day it was delivered by the D. L. & W. R. Co. to the Long Island R. Co., in the latter's capacity as an expressman; that the trunk was delivered on the afternoon of July third and that its contents were then wringing wet. It was held that a receipt for the trunk given by the Long Island R. Co. to the plaintiff, which he neither read nor had his attention called to, could not operate to restrict the liability of the Long Island R. Co.

Same—Baggage Check.—In *Indianapolis, etc., R. Co. v. Cox*, 29 Ind. 360, 95 Am. Dec. 640, it appeared that appellee purchased a passenger ticket issued by the appellant railroad. His baggage was taken charge of by the railroad for delivery at his destination, and a check given him for it, on one side of which was stamped these words: "In consideration of free carriage, its value is agreed to be limited to one hundred dollars," and on the other, "I. & C. R. R., 583, Indianapolis and Shelbyville." Appellee could have read the words and figures on the check. The value of the trunk, which was lost by the railroad, exceeded one hundred dollars. It was held that if such a limitation of the carrier's liability could be secured to the carrier, it could only be by express contract, and the check, under the circumstances, did not constitute such a contract.

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Passenger Ticket or Baggage Check.—Words on a railroad passenger ticket or baggage check purporting to limit the carrier's liability to a specific amount for loss of baggage, are not binding on the passenger, unless, with knowledge of such limitation, he assents to it. So held in *Baltimore & O. R. Co. v. Campbell*, 36 Ohio St. 647, 38 Am. Rep. 617, 3 Am. & Eng. R. Cas. 246.

Same—Memorandum on Express Receipt for Baggage.—In *Limburger v. Wescott*, 49 Barb. (N. Y.), 283, it appeared that by a memorandum on a receipt for baggage, issued by an express company, it was stated that the "liability" of the company was "limited to \$100, except by special agreement to be noted" thereon. It was held that in the absence of any knowledge by the owner of the baggage of such condition there was no consent to it by him, and no bargain between the parties, limiting the liability of the company.

Same—Baggage—New Jersey Doctrine.—In New Jersey, it is held that a condition in a railroad ticket restricting a passenger to 150 pounds of baggage, and limiting the company's responsibility for it to \$100 per pound, is invalid, in case of loss, in the absence of evidence that the passenger's attention was especially called to the stipulation. *Wiegard v. Central R. Co. (C. C.)*, 75 Fed. Rep. 370.

Baggage—Steamship Passenger Ticket—Blank Spaces Filled in by Passenger.—In *The Minnetonka (D. C.)*, 132 Fed. Rep. 52, it is held that stipulations of a steamship passenger ticket purporting to exempt the ship from liability for loss of the passenger's baggage by theft or any act of neglect or default of the carrier's employees or other persons for whose acts it is responsible, and arbitrarily valuing the passenger's baggage at £20, in the absence of a bill of lading therefor and the payment of an additional freight charge for transportation, and exempting the ship from liability under any circumstances for jewelry, etc., unless declared and delivered into the personal custody of the chief steward or purser of the vessel, were unreasonable and contrary to public policy; and the fact that the ticket containing such conditions was handed to the passenger who filled in some blank spaces under a caption, "Passengers will please fill in the following information required by United States authorities," disclosing certain facts relating to herself and traveling companion, did not render such stipulations binding upon her, it appearing that she never read nor adopted them.

Same—Notice Printed upon Face of Ticket—Failure to Read—Negligence—Illiterate.—In *Mauritz v. New York, etc., R. Co. (C. C.)*, 23 Fed. Rep. 765, 21 Am. & Eng. R. Cas. 286, it is held that the liability of a railroad company for the safe carriage of a passenger's baggage is not restricted by a notice printed upon the face of the ticket issued by such company, stating the terms upon which the baggage will be carried, unless the passenger's attention is called to it when purchasing the ticket, or unless the circumstances of the transaction are such as to make the failure of the passenger to read

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the conditions on the ticket negligence per se. And where the passenger is unable to read, and no explanation is made by the agent of the railroad selling the ticket, he is not bound by special terms printed on the ticket.

D. MINORITY DOCTRINE—EXPRESS ASSENT NOT ESSENTIAL.

Some authorities hold that where such a general notice is reasonable, and brought to the shipper's attention so as to charge him with knowledge of its purport, his express assent to the condition purporting to limit the carrier's liability is not necessary in order to render it binding.

Louisiana.—*Baldwin v. Collins*, 9 Rob. (La.) 468.

Maine.—*Fillebrown v. Grand Trunk R. Co.*, 55 Me. 462, 92 Am. Dec. 606; *Sager v. Portsmouth, etc., R. Co.*, 31 Me. 228, 50 Am. Dec. 659.

New York.—*Cole v. Goodwin*, 19 Wend. (N. Y.) 251, 32 Am. Dec. 470.

North Carolina.—*Smith & Milton v. North Carolina R. Co.*, 64 N. Car. 235.

Tennessee.—*Louisville, etc., R. Co. v. Sowell*, 90 Tenn. 17, 15 S. W. 837.

Vermont.—*Farmers' & Mechanics' Bank v. Champlain Trans. Co.*, 23 Vt. 186, 56 Am. Dec. 68.

Virginia.—*Virginia & Tenn. R. Co. v. Sayers*, 26 Gratt. (Va.) 328.

The liability of a carrier may be limited by the terms of a general notice, when those terms are reasonable and just, and are brought home to the knowledge of the owner of the goods. So held in *Blumenthal v. Brainard*, 38 Vt. 402, 91 Am. Dec. 350.

General Notice—Burden of Proof.—The implied liability of a common carrier may be qualified by express contract or general notice, but the burden of proving such defense is on the party setting it up. So held in *Verner v. Sweitzer*, 32 Pa. St. 208. In this case it is said in the opinion: "And it has been adjudged, that proof of general notice of limitation of liability must be such as amounts to actual notice, or shown to have been so conspicuous that the party sought to be affected by it could not have failed to discover it without gross negligence, the affirmative of which is upon the carrier. And that emblazoning the general object on a check, ticket or notice, like the one used here, in large letters, but stating the restriction in small ones, is insufficient. Story on Bailm., § 558; Angell on Car., §§ 247, 248, 249; also, 2 Greenl. Ev., § 216; and per Black, C. J., in *Chouteaux v. Leech*, 18 Pa. St. (6 Harris) 224, 232-3, 57 Am. Dec. 602."

Public Notice Considered in Construing Express Contract.—In *Orndorff & Co. v. Adams Express Co.*, 66 Ky. (3 Bush.) 194, 96 Am. Dec. 207, it is held that a public notice given by a common carrier, brought home to the knowledge of the shipper, enters into the ship-

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ping contract, so far as the carrier has the right to impose such terms, either by express or implied contract. And such notice, if not inconsistent with the express contract, will be considered in construing the express contract.

Bill of Lading—Stipulation Read and Not Objected to.—Where a stipulation in a bill of lading, purporting to limit the carrier's liability, is read and not objected to by the shipper, his assent to it may be inferred. So held in *Merchants', etc., Transp. Co. v. Joesting*, 89 Ill. 152.

Limiting Liability to Own Line.—Where the receipt or bill of lading of goods marked to a certain point recited that the goods were to be transported over the line of the defendant's road, to a certain station, and there delivered, in good order to another company, whose line was a part of the route to the place of destination, and that the liability of defendant, as a common carrier, should cease when the goods were so delivered at that station to the other company, and the shipper accepted such receipt with knowledge of its contents, it became the contract of both parties, and the responsibility of the company, as a common carrier, ended with the delivery of the goods at the station named in the receipt. So held in *Field v. Chicago, etc., R. Co.*, 71 Ill. 458.

Same—Printed Stipulation on Passenger Ticket.—Where the ticket sold by a railroad company to a point upon a connecting line contained a printed stipulation, that in selling it the company acted as agent only for railroads beyond the terminus of its road, and assumed no responsibility therefor, such company is not liable to a passenger for the loss of baggage not occurring upon the line of its own road. So held in *Pennsylvania Cent. R. Co. v. Schwarzenberger*, 45 Pa. St. 208. In this case it is said in the opinion: "The defendants are not common carriers except between Philadelphia and Pittsburgh. They were under no obligation to carry the plaintiff beyond the termination of their route, or to transport his luggage. It is true, they received the fare for the whole distance from Philadelphia to Cincinnati, and if that were all, it might raise a presumption of an agreement to carry over the entire route between the two cities. But contemporaneously with the receipt of the fare, and as evidence of the contract into which they entered, they gave to the plaintiff a ticket, informing him that they assumed no responsibility for his carriage, and of course of his baggage, beyond Pittsburgh, and not at all for themselves. With this express disclaimer of personal liability, there is no possibility of implying an engagement. It is not to be doubted that the defendants could act as agents for a connecting railroad line, and if they could, the contract for carriage between Pittsburgh and Cincinnati was with the principals of the defendants and not with themselves. * * * It is settled in this state that a carrier may limit his responsibility even upon his own route, by a general notice that the baggage of a passenger is at the risk of the owner,

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provided the terms of the notice are clear and explicit, and provided the notice is brought home to the employer. *Beckman v. Shouse*, 5 Rawle 179, 189, 28 Am. Dec. 653; *Bingham v. Rodgers*, 6 W. & S. (Pa.) 495, 500, 40 Am. Dec. 581; and *Laing v. Colder*, 8 Barr (Pa. St.) 479, 484, 49 Am. Dec. 533."

Transportation of Commodities beyond Line of Carrier's General Business—Reasonable Conditions.—A common carrier may, by general notice, brought to the knowledge of the shipper, limit its responsibility for carrying certain commodities beyond the line of its general business, or it may make its responsibility depend upon certain reasonable conditions. So held in *Farmers' & Mechanics' Bank v. Champlain Trans. Co.*, 23 Vt. 186, 56 Am. Dec. 68.

Distinction between Notices Merely Designed to Insure Fair Dealing and Others.—There is a distinction between the effect of those notices by a carrier by which it is sought to relieve from duties which the law has annexed to his employment, and those designed simply to insure good faith and fair dealing on the part of the consignor. In the former, notice without assent to the attempted restriction, is ineffectual, while in the latter actual notice alone will be sufficient. So held in *Oppenheimer v. United States Express Co.*, 69 Ill. 62, 18 Am. Rep. 596.

Baggage—Passenger Ignorant of English.—Though in Pennsylvania a common carrier may limit his responsibility by a general notice, yet the terms of the notice must be clear and explicit, and the person with whom the carrier deals must be fully informed of the terms and effect of the notice. The limitation is to be confined to cases of special contract, express or implied, and where the notice is in English and the passenger a German, who did not understand English, the carrier must prove the knowledge of the passenger of the limitation in the notice. So held in *Camden & A. R. Co. v. Baldauf*, 16 Pa. St. 67.

E. REASONABLE REGULATIONS—DISCLOSURE OF VALUE.

And it is held by some authorities that general notice of a reasonable regulation of the carrier, such as one declaring that the true value of goods must be disclosed when they are tendered for shipment or the amount of the carrier's liability will be limited to their apparent value, will bind the shipper, whether his attention is called to it or not.

United States.—*Hopkins v. Westcott*, 6 Blatchf. (U. S.) 64; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. (U. S.) 344.

Connecticut.—*Lawrence v. New York, etc., R. Co.*, 36 Conn. 63.

Kansas.—*Kallman v. United Express Co.*, 3 Kan. 205.

Maryland.—*Brehme v. Dinsmore*, 25 Md. 328.

Massachusetts.—*Judson v. Western R. Corp.*, 88 Mass. (6 Allen), 486, 83 Am. Dec. 646.

Michigan.—*McMillan v. Michigan, etc., R. Co.*, 16 Mich. 79, 93 Am. Dec. 208.

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Missouri.—Ketchum *v.* American Merchants' Union Express Co., 52 Mo. 390; Snider *v.* Adams Express Co., 63 Mo. 376.

New Hampshire.—Moses *v.* Boston & M. R. Co., 32 N. H. 523, 64 Am. Dec. 381.

New York.—Fibel *v.* Livingston, 64 Barb. (N. Y.), 179.

Vermont.—Farmers' & Mechanics' Bank *v.* Champlain Trans. Co., 23 Vt. 186, 56 Am. Dec. 68.

Wisconsin.—Boorman *v.* American Express Co., 21 Wis. 152.

MISCELLANEOUS.

Secret Instructions to Carrier's General Agent.—The common-law liability of a common carrier cannot be limited by secret instructions given to its general agent. So held in Walker *v.* Skipwith, 19 Tenn. (Meigs) 502, 33 Am. Dec. 161.

Usage—Implied Agreement.—Usage is a fact which may be resorted to to show that a contract limiting a common carrier's liability is to be implied. So held in Cooper *v.* Berry, 21 Ga. 526.

Notice to Agent Must Be in Same Transaction.—Even if a certain notice could limit the defendant common carrier's liability, knowledge of it in other transactions by an agent of the owners of the freight, in the transaction in question, would not affect the principals, as a notice to an agent, in order to bind the principal, must be in the same transaction. So held in Blumenthal *v.* Brainard, 38 Vt. 402, 91 Am. Dec. 350.

III. SPECIAL CONTRACT LIMITATION—HOW EFFECTED.

A. BY SPECIAL CONTRACT.

Whatever may have been the lack of harmony on this question in the past, the doctrine now universally supported in the United States is that a carrier may restrict its common-law liability for loss of or injury to freight by a reasonable condition of a special contract. Camp *v.* Hartford, etc., Co., 43 Conn. 333, 334; Erie Ry. Co. *v.* Wilcox, 84 Ill. 239, 25 Am. Rep. 451; Feige *v.* Michigan Cent. R. Co., 62 Mich. 1, 28 N. W. 685; Potts *v.* Wabash, etc., R. Co., 17 Mo. App. 394; Richmond, etc., R. Co. *v.* Payne, 86 Va. 480, 10 S. E. 749, 42 Am. & Eng. R. Cas. 366; Zouch *v.* Chesapeake, etc., R. Co., 36 W. Va. 524, 15 S. E. 185, 49 Am. & Eng. R. Cas. 702; Kirkland *v.* Dinsmore, 62 N. Y. 171, 20 Am. Rep. 475.

B. MUST READ CONTRACT.

It is generally held that the shipper must, at his peril, acquaint himself with the contents of the freight receipt, bill of lading, or other paper containing the shipping contract, for even should he fail to do so he will, under ordinary circumstances, be held chargeable with knowledge of its terms.

Patterson *v.* Kansas City, etc., R. Co., 56 Mo. App. 657; Western Ry. Co. *v.* Harwell, 91 Ala. 340, 8 So. 649; Wabash, St. L. & P. Ry.

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Co. v. Black, 11 Ill. App. 465; **Zimmer v. New York, etc., R. Co.**, 137 N. Y. 460, 33 N. E. 642.

A shipper must, at his peril, read the shipping contract. So held in **Wyrick v. Missouri, etc., Ry. Co.**, 74 Mo. App. 406.

Bill of Lading Signed by Shipper—Failure to Read—Prior Loading of Stock.—In the absence of fraud or mistake, a bill of lading containing special limitations of the common carrier's liability, signed by the shipper, is conclusive as to the terms of the contract; and he cannot invalidate it by showing that he signed it without reading it, and that his animals were all ready on the cars. So held in **Western Ry. Co. v. Harwell**, 91 Ala. 340, 8 So. 649.

Bill of Lading—Evidence of Failure to Read.—In an action against a carrier for loss or injury to freight, evidence is not admissible, in the absence of fraud, to show that the the consignor did not read the bill of lading delivered to him by the carrier. So held in **Grace v. Adams**, 100 Mass. 505, 9 Am. St. Rep. 131, 97 Am. Dec. 117.

Limiting Liability to Own Line—Put upon Inquiry—Negligence.—Where the consignor was expressly told that the carrier's lines extended no further than a certain point, and at such point the money shipped would be delivered to a stage company to be forwarded, this was enough to have put him upon inquiry as to the extent of the initial carrier's undertaking, and if he did not in fact read the contract, which limited its liability to its own line, he was guilty of inexcusable negligence. So held in **United Express Co. v. Haines**, 67 Ill. 137.

Condition on Back of Bill of Lading—Immaterial Question.—Whether or not a shipper was negligent in failing to read a condition printed on the back of a bill of lading limiting the valuation of the property in case of loss is immaterial on an issue as to whether he was bound thereby, which depends entirely on whether he assented to the condition. **Baltimore & O. R. Co. v. Doyle** (C. C. A.), 142 Fed. Rep. 669.

Receipt Containing Letters "(O. R.)"—Shipper's Testimony—Mere Failure to See.—In **Morrison v. Phillips, etc., Co.**, 44 Wis. 405, 28 Am. Rep. 599, it appeared that it was the custom of the defendant carrier to carry horses at owner's risk, and at reduced rates for that reason, and the letters "(O. R.)," signifying "Owner's Risk," were upon the receipt given plaintiff for his horses, and retained and put in evidence by him, and he testified that "he did not see" those letters, but not that he did not understand their meaning. It was held that the restricted liability of the carrier clearly appeared from plaintiff's evidence.

Receipt or Contract Signed by and Accepted from Agent of Transfer Company.—In **Merrill v. Pacific Transfer Co.**, 131 Cal. 582, 63 Pac. 915, it is held that it is a question for the jury whether, under all the circumstances as disclosed by the evidence, the shipper, in accepting a receipt or contract signed by the agent of the transfer com-

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pany, had actual or constructive knowledge of the limitation of liability contained in it; and it was error to refuse to instruct the jury properly upon the subject of constructive notice of the limitation, and that if they found he had such notice, it was no excuse for plaintiff to say that he did not read the limitation, if he had the sufficient opportunity to do so.

Baggage—Limiting Liability to Own Line—Through Ticket—Failure to Read Printed Conditions—In *Central Trust Co. v. Wabash, etc., Ry. Co.* (C. C.), 31 Fed. Rep. 246, 247, it is held that the initial carrier of passenger's baggage shipped over connecting lines of railroad is not liable for injury to it at a point beyond the terminus of its own line, where it appears that a through ticket was purchased in the usual way; and that, although its purchaser did not read the stipulations printed on it purporting to limit the liability of the initial carrier selling it to loss or injury occurring on its own line.

Failure to Read or Sign—Objection after Contract Has Been Acted upon—After a contract purporting to limit the common law liability of a railroad company in the carriage of freight has been acted upon by both parties, the consignor, in the absence of fraud on the part of the railroad in procuring his signature to the contract, if he had the opportunity to read it, cannot avoid it on the ground that he did not read, or hear it read, and signed it under a mistake as to its contents. So held in *St. Louis, etc., R. Co. v. Weakly*, 50 Ark. 397, 8 S. W. 134, 35 Am. & Eng. R. Cas. 635, 7 Am. St. Rep. 104. In this case it is said in the opinion: "Appellees contend that they never assented to the limitation of the liabilities of appellant contained in the contract signed at Memphis, because they signed it without reading it or hearing it read, and under a mistake of its contents. But this will not relieve them from the contract, unless it was procured by fraud or imposition. As said by Hutchison on carriers, there is nothing unreasonable in this.

"Every man of ordinary intelligence knows that no individual or company engaged in the business of carrying to distant places now undertakes to carry his goods subject to the old common law liability of the carrier. He knows, moreover, that bills of lading are constantly given not only as evidence of the receipt of the goods, but as an express and direct notice that they will be carried on certain terms. Knowing this he cannot be willfully blind and plead ignorance when it was his duty to know; and knowing in such cases is assenting. If it was his intention to hold the carrier to his common law liability, he should have said so, and have either declined to employ him or sued him for his refusal, after tendering a reasonable sum for his services or risk." *Hutchison on carriers*, sec. 240; *McMillan v. Michigan, etc., R. Co.*, 16 Mich. 79, 93 Am. Dec. 208; *Squire v. New York Cent. R. Co.*, 98 Mass. 239, 93 Am. Dec. 162; *Long v. N. Y. Cent. R. Co.*, 50 N. Y. 76, 3 Am. Ry. Rep.

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350; *McElroy v. Buckner*, 35 Ark. 555; *Hallenbeck v. DeWitt*, 2 Johns. 404; *Rice v. Dwight Manf. Co.*, 2 Cush. 80, 87; *Harris v. Stoy*, 2 E. D. Smith, 363, 367; *Lewis v. Great Western R. Co.*, 5 H. & N. 867; *Cooly on Torts*, pp. 488, 491; *Greenfield's Estate*, 14 Penn. St. 489, 504; *Hunter v. Walters*, 7 L. R. Ch. App. 75, 82, 84; *Morrison v. Phillips, etc., Co.*, 44 Wis. 405, 409, 28 Am. Rep. 599; *Fuller v. Madison Mutual Ins. Co.*, 36 Wis. 599; *Long v. N. Y. Cent. R. Co.*, 50 N. Y. 76, 3 Am. Ry. Rep. 350; *Mulligan v. Illinois Cent. Ry. Co.*, 36 Iowa 181, 14 Am. Rep. 514, 2 Am. Ry. Rep. 322, 328; *Grace v. Adams*, 9 Am. St. Rep. 131; S. C., 100 Mass. 505, 97 Am. Dec. 117.

Shipping Contract Referring to Bill of Lading—Failure to Read.—

But a stipulation in a shipping contract that goods were to be shipped "as per conditions in company's bill of lading" is not binding on the shipper, where such provision was not read by the shipper, and was inserted in the bill of lading without his knowledge or consent. So held in *Cleveland, etc., R. Co. v. Potts & Co.*, 33 Ind. App. 564.

Right to Regard Paper as Mere Receipt or Voucher—Failure to Read Not Negligence Per Se.—And in *Madan v. Sherard*, 73 N. Y. 329, 29 Am. Rep. 153, it appeared that a traveler, on delivery of his baggage to a local express company, received a paper, which, from the circumstances of the transaction, he had a right to regard simply as a receipt or voucher, to enable him to identify his property, and no notice was given to him that it embodied the terms of a special contract, or was intended to subserve any other purpose than as a voucher. It was held that his omission to read the paper was not negligence per se, and he was not, as matter of law, bound by its terms; and that the question whether, in a particular case, the party receiving such a receipt, accepted it with notice of its contents, or with notice that it contained the terms of a special contract, so as to require him to acquaint himself with its contents, is one of evidence to be determined by the jury.

C. MERE ACCEPTANCE OF RECEIPT OR BILL OF LADING BINDS SHIPPER.

The authorities holding that the consignor must, at his peril, read the shipping contract also support the rule that his mere acceptance of a freight receipt or bill of lading implies his assent to all legal and reasonable limitations of the carrier's liability which it may embrace.

United States.—*Calderon v. Atlas Steamship Co. (C. C. A.)*, 69 Fed. Rep. 574; *Charnock v. Texas, etc., R. Co.*, 194 U. S. 432, 48 L. Ed. 1057; *Cau v. Texas, etc., R. Co.*, 194 U. S. 427, 48 L. Ed. 1053; *Hopkins v. Westcott*, 6 Blatchf. (U. S.), 64; *Jennings v. Smith*, 106 Fed. Rep. 139; *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.), 318, 329, 21 L. Ed. 297; *The Henry B. Hyde*, 82 Fed. Rep. 681.

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Alabama.—*Jones v. Cincinnati, etc.*, R. Co., 89 Ala. 376, 8 So. 61, 45 Am. & Eng. R. Cas. 321; *Mouton v. Louisville, etc.*, R. Co., 128 Ala. 537; *Steele v. Townsend*, 37 Ala. 247, 79 Am. Dec. 49; *Western Ry. Co. v. Harwell*, 91 Ala. 340, 8 So. 649.

Arkansas.—*St. Louis, etc.*, R. Co. *v. Weakly*, 50 Ark. 397, 8 S. W. 134, 35 Am. & Eng. R. Cas. 635, 7 Am. St. Rep. 104.

California.—*Michalischke v. Wells Fargo & Co.*, 118 Cal. 683, 50 Pac. 847.

Connecticut.—*Lawrence v. New York, etc.*, R. Co., 36 Conn. 63; *Means v. New York, etc.*, R. Co., 75 Conn. 171.

Illinois.—*Adams Express Co. v. Haynes*, 42 Ill. 89; *Chicago, etc., Ry. Co. v. Montford*, 60 Ill. 175; *Chicago & N. W. Ry. Co. v. Simon*, 160 Ill. 648, 43 N. E. 596; *Field v. Chicago, etc.*, R. Co., 71 Ill. 458; *Illinois Cent. R. Co. v. Frankenberg*, 54 Ill. 88, 5 Am. Rep. 92; *Anchor Line v. Dater*, 68 Ill. 369.

Indiana.—*Adams Express Co. v. Carnahan*, 29 Ind. App. 606.

Iowa.—*Mulligan v. Illinois Cent. R. Co.*, 36 Iowa 181, 14 Am. Rep. 514, 2 Am. Ry. Rep. 322, 328.

Kansas.—*Atchison, etc.*, R. Co. *v. Dill*, 48 Kan. 210, 29 Pac. 148, 55 Am. & Eng. R. Cas. 375; *Kallman v. United Express Co.*, 3 Kan. 205.

Kentucky.—*Adams Express Co. v. Nock*, 63 Ky. (2 Duv.) 562, 87 Am. Dec. 510; *Louisville & N. R. Co. v. Brownlee*, 77 Ky. (14 Bush) 590.

Maryland.—*Brehme v. Dinsmore*, 25 Md. 328.

Massachusetts.—*Cox v. Central Vermont R. Co.*, 170 Mass. 129, 49 N. E. 97; *Grace v. Adams*, 100 Mass. 505, 9 Am. St. Rep. 131, 97 Am. Dec. 117; *Graves v. Adams Express Co.*, 176 Mass. 280, 57 N. E. 462.

Michigan.—*Feige v. Michigan Cent. R. Co.*, 62 Mich. 1, 28 N. W. 685; *Hengstler v. Flint, etc.*, R. Co., 125 Mich. 530; *McMillan v. Michigan, etc.*, R. Co., 16 Mich. 79, 93 Am. Dec. 208; *Smith v. American Express Co.*, 108 Mich. 572, 66 N. W. 479.

Minnesota.—*Christenson v. American Express Co.*, 15 Minn. (Gil. 208) 270, 2 Am. Rep. 122; *Hutchinson v. Chicago, etc.*, R. Co., 37 Minn. 524, 35 N. W. 433.

Mississippi.—*Southern Express Co. v. Moon*, 39 Miss. 822.

Missouri.—*Kellerman v. Kansas City, etc.*, R. Co., 136 Mo. 177, 34 S. W. 41, 37 S. W. 828; *Kirby v. Adams Express Co.*, 2 Mo. App. 369; *Levering v. Union Transp. & Ins. Co.*, 42 Mo. 88, 97 Am. Dec. 320; *Snider v. Adams Express Co.*, 63 Mo. 376.

New Hampshire.—*Durgin v. American Express Co.*, 66 N. H. 277, 20 Alt. 328; *Merrill v. American Express Co.*, 62 N. H. 514.

New York.—*Belger v. Dinsmore*, 51 N. Y. 166; *Germania F. Ins. Co. v. Memphis, etc.*, R. Co., 72 N. Y. 90, 28 Am. Rep. 115; *Giles v. Fargo*, 60 N. Y. Super. Ct. 117; *Hill v. Syracuse, etc.*, R. Co., 73 N. Y. 351, 29 Am. Rep. 163; *Kirkland v. Dinsmore*, 62 N. Y. 171, 20 Am. Rep. 475; *Landsberg v. Dinsmore*, 4 Daly (N. Y.), 490; *McMahon v.*

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Macy, 51 N. Y. 155; **Mills v. Weir**, 82 N. Y. App. Div. 396; **Springer v. Westcott**, 78 Hun (N. Y.) 365; **Wetzell v. Dinsmore**, 4 Daly (N. Y.) 193.

North Carolina.—**Phifer v. Carolina Cent. R. Co.**, 89 N. Car. 311, 45 Am. Rep. 687.

Ohio.—**Cincinnati, etc., Ry. Co. v. Berdan**, 12 Ohio Cir. Dec. 481, 22 Ohio Cir. Ct. 326.

Rhode Island.—**Ballow v. Earle**, 17 R. I. 441, 22 Atl. 1113, 48 Am. & Eng. R. Cas. 31.

South Carolina.—**Dunbar v. Charleston, etc., R. Co.**, 62 S. Car. 414; **Johnstone v. Richmond, etc., R. Co.**, 39 S. Car. 55, 17 S. E. 512, 55 Am. & Eng. R. Cas. 346.

Tennessee.—**Dillard v. Louisville, etc., R. Co.**, 2 Lea (70 Tenn.) 288; **East Tenn., etc., R. Co. v. Brumley**, 5 Lea (73 Tenn.) 401, 6 Am. & Eng. R. Cas. 356.

Texas.—**Ryan v. M. K. & T. Ry. Co.**, 65 Tex. 13, 57 Am. Rep. 589.

Vermont.—**Davis v. Central Vt. R. Co.**, 66 Vt. 290, 29 Atl. 313.

Wisconsin.—**Boorman v. Amercian Express Co.**, 21 Wis. 152; **Ullman v. Chicago, etc., R. Co.**, 112 Wis. 150, 88 N. W. 41, 23 Am. & Eng. R. Cas., N. S., 782.

A bill of lading or receipt for freight issued by a common carrier to a consignor, and received by him without objection, and without any insistence upon the common-law liability of the carrier, is a contract fixing the rights and liability of the consignor and carrier. So held in **Smith v. American Express Co.**, 108 Mich. 572, 66 N. W. 479.

Assent Presumed.—Where there is nothing to show that a clause in a receipt for freight, purporting to limit the carrier's common-law liability was objected to by the consignor or escaped his notice, it is to be presumed that it was assented to. So held in **Christenson v. American Express Co.**, 15 Min. (Gil. 208) 270, 2 Am. Rep. 122.

As Binding as if Signed.—In **Adams Express Co. v. Carnahan**, 29 Ind. App. 606, it is held that the acceptance by the consignor of a freight receipt from an express company implies an accession to its terms, thereby creating a contract equally as binding as though signed by both parties.

Acceptance of Freight Receipt—May Constitute Contract.—The acceptance by a shipper, without objection, of a receipt for goods purporting to limit the common-law liability of a common carrier, may constitute a contract binding upon the shipper. So held **Durgin v. American Express Co.**, 66 N. H. 277, 20 Atl. 328.

Bill of Lading—Failure to Object to Stated Value.—If a bill of lading issued by a common carrier states the value of the property received for shipment, or the maximum value thereof, either as declared by the shipper or without specifying the same to be so declared, and the latter, without objecting to such stated value, de-

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livers his property to the carrier and receives the bill, he thereby assents to the terms thereof as regards such value. So held in *Ullman v. Chicago, etc., R. Co.*, 112 Wis. 150, 23 Am. & Eng. R. Cas., N. S., 782, 88 N. W. 41.

Limiting Value—True Value Not Stated in Receipt.—Where the freight receipt of a common carrier stipulated that the carrier was not to be held liable for any loss or damage except as forwarders, nor on any package or thing for over \$150, unless its true value was stated in such receipt, and the receipt was silent as to the value of the goods, it was held that the shipper, having received the receipt without objection, was bound by its terms. So held in *Kallman v. United Express Co.*, 3 Kan. 205.

Unread Express Receipt.—The acceptance without objection, by a shipper, of an express company's receipt for goods delivered, though it be unread, at the time, constitutes a contract between the parties, and binds the shipper as to restrictions of the company's liability contained in it. So held in *Soumet v. National Express Company*, 66 Barb. (N. Y.), 284.

To Be Shipped at Carrier's Convenience—Bill of Lading—Shipper Chargeable with Legal Notice of Terms.—A bill of lading, advantageous to both shipper and carrier, received by the shipper without objection, stipulating that his cotton was to be shipped "at company's convenience," is evidence of his assent to such restriction of the carrier's liability, equivalent to an express agreement, and charges the shipper with legal notice of its terms. So held in *Whitehead & Stokes v. Wilmington & W. R. Co.*, 87 N. Car. 255, 9 Am. & Eng. R. Cas. 168.

Limiting Value—Baggage—Conditions on Back of Steamship Passenger Ticket.—A condition on the back of a steamship passenger ticket purporting to limit the carrier's liability for baggage to \$10, unless extra payment is made, is binding upon the passenger, when he receives the ticket in time to examine it thoroughly before embarking; as the extent of a carrier's liability for baggage, being not fixed by the common-law, is subject to reasonable regulation by the carrier. So held in *Potter v. The Majestic (C. C. A.)*, 60 Fed. Rep. 624.

No Improper Means Used by Carrier—Conclusive Presumption.—In *Atlantic Coast Line R. Co. v. Dexter (Fla.)*, 19 R. R. R. 787, 42 Am. & Eng. R. Cas., N. S., 787, 39 So. 634, it is held that the settled rule in the United States that an acceptance by a shipper or his agent of a receipt or bill of lading containing a limitation of the carrier's liability may be binding on him although it is not shown that he was aware of it, or that he had read it, or that it had been explained to him, or his attention called to it, provided the carrier made use of no improper means to prevent his noticing or objecting to it; and that every shipper is conclusively presumed, in such a case, to have read and assented to the provisions of the receipt or

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bill of lading given him, whether he in fact assented or not, and he is estopped from gainsaying or repudiating it.

Limiting Value—Express Provision in Body of Bill of Lading—Invalidity to Read—Failure to Apply for Information.—In *Fibel v. Livingston*, 64 Barb. (N. Y.) 179, it appeared that plaintiff, on delivering to a common carrier goods for transportation, received a bill of lading, or receipt, containing, in its body, an express provision, that plaintiff should not demand, in any event, beyond the sum of fifty dollars, at which the goods forwarded were thereby valued, unless otherwise therein expressed, or unless expressly insured by the carrier, and so specified in the receipt; that plaintiff accepted such bill of lading, without making any objection to its terms, or giving any statement of the value of the property shipped or informing the carrier of his inability to read, or applying for any information as to the contents of the instrument. It was held that the liability of the defendant, to the plaintiff, under this contract, was limited to \$50 and interest.

Same—Steamer Ticket—Failure to State Value—Loss of Trunk—Gross Negligence.—In *Steers v. Liverpool, etc., Co.*, 57 N. Y. 1, it appeared that plaintiff took passage on one of defendant's steamers for Europe, she received on payment of the passage money a printed ticket signed by defendant's agent, which provided that defendant was not to be held liable for loss or damage to baggage in any sum unless the same shall have been proved to have been occasioned by gross negligence of the company or its agents, or, in any event, beyond the sum of fifty dollars, unless a bill of lading or receipt was signed therefor, specifying the articles and their values; and that money, jewelry and all valuables were at the passenger's risk unless placed in the company's charge, and a bill of lading or receipt signed therefor. On going aboard, plaintiff's trunk was delivered into the custody of defendant's agents, who assumed charge of it; and that at the end of the voyage defendant did not produce it or in any way account for it. It was held that the evidence was sufficient to sustain a finding of gross negligence, but that in the absence of a bill of lading or receipt as specified in the contract, a recovery could not be had for over \$50.00.

Limiting Liability after Arrival at Destination—Receipt Referring to Regulations Printed upon Its Back.—In *Ayres v. Western R. Corp.*, 14 Blatchf. (U. S.) 9, it appeared that freight, in the course of transportation from W. S., Mass. to C., Ohio, was destroyed by fire in the depot of defendant railroad, at E. A., N. Y.; that defendant, when it received the goods at W. S., gave a receipt, setting forth that it had received 4 cases, marked J. B. C., Cleveland, Ohio; that such receipt, on its face said: "This contract, and the responsibility of the parties hereto, being limited and controlled by the rules and regulations printed upon the back of this receipt," "it being also understood, that this corporation assumes no liability beyond the end of

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its own line, and that, so far as it acts as agent for other parties participating in the joint transit aforesaid, said parties are separately liable." The back of the receipt said: "The following rules and regulations have been adopted by the several railroad corporations in regard to freight:" "The company will not hold itself liable as common carriers, for articles of freight, after their arrival at their place of destination and unloading at the company's warehouses or depots." "All articles of freight must be taken away within 24 hours after being unladen from the cars." The cases were marked as described in the receipt, and also marked, "care of Western Transportation Co.," a corporation engaged in carrying freight on the Erie Canal. The terminus of defendant's road was at E. A. The freight arrived there and was unladen at defendant's warehouse. Three days afterwards the warehouse took fire, and such freight was consumed, without fault on the part of defendant. It did not appear that notice of the arrival of the freight was given by defendant to the Western Transportation Company. It was held that defendant was liable for the value of the goods. In this case it is said in the opinion: "But, if it should be conceded that the conditions upon the back of the receipt are so expressed as to refer to the warehouse of the defendant, and relieve it from the obligations of a carrier after the arrival of the goods there, the same result must follow, because of the controlling authority here of the case of *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.) 318, 21 L. Ed. 297. It is there held, that the delivery by the carrier to the shipper, of a shipping receipt, which, upon its face, refers to conditions on the back, defining the terms of the carrier's responsibility, and its acceptance by the shipper, does not constitute a special contract between the shipper and the carrier, by which the liability of the latter is limited by the conditions on the back of the receipt."

Receipt Referring to Regular Bill of Lading.—Where a shipper accepts for freight delivered to a common carrier a receipt providing that the shipment is received subject to the terms and restrictions of the carrier's liability expressed by the carrier's regular bill of lading, he is bound by such terms and conditions. So held in *Dunbar v. Charleston, etc., Car Ry. Co.*, 62 S. Car. 414.

Receipt—Chargeable with Notice of Contents—Prior Parole Negotiations.—In *Hill v. Syracuse, etc., R. Co.*, 73 N. Y. 351, 29 Am. Rep. 163, it is held that where, upon the delivery of goods to the carrier for transportation, and before shipment, a receipt or bill of lading is delivered to the shipper, and received by him without objection, he is chargeable with notice of its contents, and is bound by its terms, and prior parole negotiations cannot be resorted to vary them.

Limiting Value—Failure of Owner's Agent to State Value—Package of Light and Costly Goods.—In *Brehme v. Dinsmore*, 25 Md. 328, an action against an express company, upon a contract for the transportation of a package of merchandise from the city of New York

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to Baltimore, it appeared that the shipping contract was evidenced by a printed receipt signed by the agent of defendant and delivered to plaintiff's agent in New York, containing a stipulation that in no event "shall the holder thereof demand beyond the sum of fifty dollars, at which the article forwarded is hereby valued, unless otherwise herein expressed, or unless specially insured" by the company," and so specified in this receipt." The contents of the package, which were lost in transit, were not known to the express company, no statement of its value made by plaintiff when it was received, and no special insurance made. The package contained light and costly goods of the value of \$675. It was held that the receipt constituted a special contract between the parties for the carriage of the package, binding upon both, and that the plaintiff could only recover the sum at which the package was valued in the receipt, with interest.

Limiting Liability to Own Line—Failure of Shipper to Testify That He Did Not Read Receipt.—In *Mills v. Weir*, 82 N. Y. App. Div. Rep. 396, it appeared that an express company, upon accepting a trunk for transportation, delivered to the shipper a receipt stating that the trunk was to be "forwarded to our agency nearest or most convenient to destination only, and there delivered to other parties to complete the transportation;" that the express company might intrust the trunk to the possession of other carriers; and that, if it did so, such other carrier was to be regarded as the agent of the shipper or owner, and that the express company should not be responsible for any negligence or dereliction of duty on the part of such other carrier. The shipper did not testify that he did not read the receipt. It was held that the terms of such receipt was binding upon the shipper.

Same—Bill of Lading—Inability to Read.—In *Jones v. Cincinnati, etc., R. Co.*, 89 Ala. 376, 8 So. 61, 45 Am. & Eng. R. Cas. 321, it is held that an express provision in a bill of lading, limiting the carrier's liability to loss or injury sustained on its own line, is binding on the consignor notwithstanding his ignorance and inability to read, when it is not shown that the carrier was informed of such ignorance, or asked to read and explain the bill of lading.

Ticket Signed by Passenger—Absence of Fraud.—In absence of fraud, a passenger signing a ticket containing stipulations limiting the liability of the carrier with respect to baggage cannot urge that he was not aware of such stipulations. So held in *Rose v. Northern Pac. Ry. Co. (Mont.)*, 23 R. R. R. 557, 46 Am. & Eng. R. Cas., N. S., 557, 88 Pac. 767.

Limiting Value—Baggage—Ticket Signed by Passenger—Evidence.—In an action by a passenger for the loss of her baggage, it appeared that the agent of the carrier received from his company a telegram requesting him to furnish a ticket to the passenger. The agent purchased the ticket which contained stipulations limiting the liability of the carrier for loss of baggage. The ticket was signed by the

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passenger. It was held that the passenger on accepting the ticket, was bound by its terms; and evidence that nothing was said to her about a reduced rate or a limitation on the value of her baggage was properly excluded. *Rose v. Northern Pac. Ry. Co. (Mont.)*, 23 R. R. R. 557, 46 Am. & Eng. R. Cas., N. S., 557, 88 Pac. 767.

Loaded in Cars upon Shipping Receipts Prepared by Shipper—Opportunity to See Regular Bill of Lading.—In *Cincinnati, etc., Ry. Co. v. Berdan*, 12 Ohio Cir. Dec. 481, 22 Ohio Cir. Ct. 326, it appeared that a shipper delivered goods to a railroad company in cars loaded and sealed by himself, and for his own convenience, upon shipping receipts prepared by himself, but conditioned that the goods were received "subject to conditions contained in the company's regular bill of lading;" and that he had an opportunity to see the bill of lading. It was held that he was bound by the lawful conditions in such regular bill of lading, whether he knew them or not.

Bill of Lading Sent by Shippers to Their Agent as Authority to Receive Goods.—A bill of lading, limiting the liability of the carrier, signed by his agent, delivered to the shippers, accepted by them and sent to their agent as authority to receive the goods, constituted the contract on which the shippers shipped the goods and on which they were received. So held in *Farnham v. Camden & A. R. Co.*, 55 Pa. St. 53.

Limiting Value—Writing in Printed Bill of Lading Blank—Distinguished from Obscure Notice in Fine Print.—In *Leitch v. Union R. Transp. Co.*, Fed. Cas. No. 8,224, it is held that where the carrier has plainly embodied into the contract a clause limiting its liability to a specified amount, as by writing it distinctly in the printed blank used as a bill of lading, with no attempt at concealment, so that it can be read at once by any one reading the contract, the shipper is bound by such restriction, where he accepted the contract or bill of lading without objection, even though he did not read it, and was ignorant of its particular provisions, such a case being distinguishable in principle from those where the carrier has attempted to limit its liability by an obscure notice in fine print, or otherwise concealed, so as to escape the attention of the shipper.

Baggage—Limiting Value—Clause in Body of Ticket.—Where a clause in a passenger ticket, issued by carriers by sea, purporting to limit their liability for passengers' baggage to a specified sum, unless higher rates are paid for any excess in value, is plainly incorporated in the body of the ticket, and ample opportunity is afforded the passenger to know it and comply with it, it is a valid part of the contract of carriage. So held in *The Kensington (D. C.)*, 88 Fed. Rep. 331.

Freight Receipt—Right to Infer Assent—Failure to Read—Objection after Loss.—In *Kirkland v. Dinsmore*, 62 N. Y. 171, 20 Am. Rep. 475, it appeared that a shipper, upon delivery of property to an express company for transportation, received, without dissent, a re-

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ceipt, with the understanding that it contained a contract on the part of company as to the transportation. It was held that, in the absence of fraud or imposition, the company had a right to infer an assent on the shipper's part to stipulations in such receipt, not unusual or unreasonable, restricting the common-law liability of the company; and that after a loss it was too late for the shipper to object that he had failed to read the receipt, and was ignorant that it contained such limitations.

Failure of Shipper to Return Bill of Lading before Burning of Freight.—In *Louisville & N. R. Co. v. Brownlee*, 77 Ky. (14 Bush), 590, it is held that the railroad company was not liable for the burning of freight in its depot at which it was received for shipment, where by the contract inserted in the bills of lading it was stipulated that the company "shall not be liable for loss or damage * * * by fire or other casualty while in transit, or while in depots or landings at points of delivery, etc.," and it appeared that the shipper received and retained the bills of lading until after the freight was destroyed by the burning of the depot, when he might have returned them before the burning.

Limiting Value—Receipt Given to Consignor's Agent—Evidence—Failure to Read or Understand.—But in *Adams Express Co. v. Nock*, 63 Ky. (2 Duv.) 562, 87 Am. Dec. 510, it appeared that upon the delivery of freight to the agent of a common carrier, he filled a blank in a receipt prepared by the company, stipulating against liability beyond the sum of \$50; that the freight was delivered by the consignor's agent, who neither read such receipt nor understood its conditions, nor signed a printed endorsement accepting such conditions, and the consignor never saw the receipt until the goods were lost. It was held that the testimony of the consignor's agent was admissible to prove that he did not read or understand the receipt and did not accept its conditions purporting to limit the liability of the carrier.

Baggage—Passenger Ticket—Inability to Read or Write.—And where plaintiff, who could neither read nor write and was not informed by any one, purchased a railroad passenger ticket containing a limitation of the liability of the carrier in respect to loss of baggage, it was held that he was not bound by the restriction. *Ranchau v. Rutland R. Co.*, 71 Vt. 142, 14 Am. & Eng. R. Cas., N. S., 416.

Limiting Value—Printed Form—Reduced Rate—Absence of Agreement Outside Bill of Lading—Negligence.—And where a shipper of pedigreed horses paid a reduced rate, and accepted a bill of lading which provided that in consideration thereof the value of the horses in case of loss should be a certain sum printed in the bill, but there was no agreement, outside the bill, that the amount so stated should be treated as the value of the animals, the shipper was not limited to such amount in an action for injuries to the animals, caused by the carrier's negligence. So held in *Louisville & N. R. Co. v. Frazee* (Ky.), 6 R. R. R. 22, 29 Am. & Eng. R. Cas., N. S., 22, 71 S. W. 437.

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D. KNOWLEDGE AND ASSENT NEED NOT BE SHOWN.

It follows, under this rule, that it is not necessary, in order to render such a limitation binding upon a shipper accepting a written shipping contract without objection, to show that he was acquainted with its contents and knowingly assented to its terms when he accepted the contract.

United States.—*Cau v. Texas, etc.*, R. Co. (C. C. A.), 113 Fed. Rep. 91; *Charnock v. Texas, etc.*, R. Co. (C. C. A.), 113 Fed. Rep. 92.

Alabama.—*Louisville & N. R. Co. v. Meyer*, 78 Ala. 597, 27 Am. & Eng. R. Cas. 44; *Mouton v. Louisville, etc.*, R. Co., 128 Ala. 537; *Western Ry. Co. v. Harwell*, 91 Ala. 340, 8 So. 649.

Indiana.—*Cleveland, etc.*, R. Co. *v. Potts*, 33 Ind. App. 564.

Iowa.—*Mulligan v. Illinois Cent. R. Co.*, 36 Iowa 181, 14 Am. Rep. 514, 2 Am. Ry. Rep. 322, 328.

Kentucky.—*Louisville & N. R. Co. v. Brownlee*, 77 Ky. (14 Bush.) 590.

Massachusetts.—*Cox v. Central Vermont R. Co.*, 170 Mass. 129, 49 N. E. 97; *Hill v. Boston, etc.*, R. Co., 144 Mass. 284, 28 Am. & Eng. R. Cas. 87, 10 N. E. 836; *Moniter, etc., Ins. Co. v. Buffum*, 115 Mass. 343; *Quimby v. Boston, etc.*, R. Co., 150 Mass. 365, 23 N. E. 205, 40 Am. & Eng. R. Cas. 693.

Michigan.—*McMillan v. Michigan, etc.*, R. Co., 16 Mich. 79, 93 Am. Dec. 208.

Missouri.—*Kellerman v. Kansas City, etc.*, R. Co., 136 Mo. 177, 34 S. W. 41, 37 S. W. 828; *Patterson v. Kansas City, etc.*, R. Co., 56 Mo. App. 657.

New York.—*Bernstein v. Weir*, 40 Misc. (N. Y.) 635; *Dobson v. Central R. Co.*, 38 Misc. (N. Y.) 582; *Germania F. Ins. Co. v. Memphis, etc.*, R. Co., 72 N. Y. 90, 28 Am. Rep. 115; *Hill v. Syracuse, etc.*, R. Co., 73 N. Y. 351, 29 Am. Rep. 163; *Kirkland v. Dinsmore*, 62 N. Y. 171, 20 Am. Rep. 475; *Rosenthal v. Weir*, 170 N. Y. 148, 63 N. E. 65; *Strong v. Long Island R. Co.*, 91 N. Y. App. Div. Rep. 442; *Wilson v. Platt*, 84 N. Y. Supp. 143; *Zimmer v. New York, etc.*, R. Co., 137 N. Y. 460, 33 N. E. 642.

South Carolina.—*Johnstone v. Richmond, etc.*, R. Co., 39 S. Car. 55, 17 S. E. 512, 55 Am. & Eng. R. Cas. 346.

Tennessee.—*Dillard v. Louisville, etc.*, R. Co., 2 Lea (70 Tenn.) 288; *East Tenn., etc.*, R. Co. *v. Brumley*, 5 Lea (73 Tenn.) 401, 6 Am. & Eng. R. Cas. 356.

Wisconsin.—*Schaller v. Chicago, etc.*, R. Co., 97 Wis. 31, 71 N. W. 1042.

Recitals in Contract Prima Facie Valid.—Recitals of limitations of the common-law liability of a common carrier in the shipping contract are prima facie evidence of the validity of such restrictions, which, without further evidence, become conclusive. So held in *Wyrick v. Missouri, etc.*, Ry. Co., 74 Mo. App. 406.

Check Receipt Given by Local Carrier.—In *Hopkins v. Westcott*, 6

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Blatchf. (U. S.) 64, it appeared that a railroad passenger delivered to a local carrier a metallic check, which he had received for his baggage, so that the local carrier might obtain the trunk and deliver it at his residence, and received from such carrier, at the same time, a paper, on which the number of the check was endorsed, and which contained a printed notice, that the carrier would "not become liable for merchandise or jewelry contained in baggage received upon baggage checks, nor for loss by fire, nor for an amount exceeding one hundred dollars, upon any article, unless specially agreed for, in writing, on this check receipt, and the extra risk paid therefor," and a statement that the owner thereby agreed that the carrier should be liable only as above stated. It was held that the passenger was chargeable with actual notice of the contents of the paper.

Limiting Value—Construction of Statute—Actual Knowledge of Terms of Contract Not Required.—In *Merrill v. Pacific Transfer Co.*, 131 Cal. 582, 63 Pac. 915, it is held that section 2176 of the Civil Code of California, providing for limitation of liability in a contract for carriage of packages, trunks, or boxes, if accepted "with a knowledge of its terms," when the value of such property is not named, is not to be construed as requiring actual knowledge of its terms, but the limitation in the contract is operative if the person accepting the contract has actual notice of circumstances sufficient to put a prudent man on inquiry as to the existence of the limitation, in which case he is legally chargeable with knowledge thereof by constructive notice.

Loss by Fire—Exemption in Bill of Lading—Chargeable with Notice—Failure to Prove Negligence.—In *Charnock v. Texas, etc., R. Co. (C. C. A.)*, 113 Fed. Rep. 92, it is held that a shipper is bound by a stipulation in the bill of lading exempting the carrier from liability for loss of the freight by fire where he was chargeable with knowledge that the bill contained such restriction, and made no objection thereto, and it is not shown that the loss was caused by the carrier's negligence.

E. SHIPPER'S KNOWLEDGE AND ASSENT PRESUMED.

In jurisdictions where such rules prevail, in the absence of unusual circumstances, the legal presumption is that a shipper when accepting a written shipping contract without objection has fully acquainted himself with and unreservedly assents to all of its conditions.

United States.—*Hopkins v. Westcott*, 6 Blatchf. (U. S.) 64; *Leitch v. Union R. Transp. Co.*, Fed. Cas. No. 8,224.

Alabama.—*Jones v. Cincinnati, etc., R. Co.*, 89 Ala. 376, 8 So. 61, 45 Am. & Eng. R. Cas. 321; *Western Ry. Co. v. Harwell*, 91 Ala. 340, 8 So. 649.

Arkansas.—*St. Louis, etc., R. Co. v. Weakly*, 50 Ark. 397, 8 S. W. 134, 35 Am. & Eng. R. Cas. 635, 7 Am. St. Rep. 104.

California.—*Michalischke v. Wells Fargo & Co.*, 118 Cal. 683, 50 Pac. 847.

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Indiana.—*Evansville, etc., R. Co. v. Kevekordes* (Ind. App.), 69 N. E. 1022.

Iowa.—*Mulligan v. Illinois Cent. R. Co.*, 36 Iowa 181, 14 Am. Rep. 514, 2 Am. Ry. Rep. 322, 328.

Maryland.—*Brehme v. Dinsmore*, 25 Md. 328.

Massachusetts.—*Cox v. Central Vermont R. Co.*, 170 Mass. 129, 49 N. E. 97; *Grace v. Adams*, 100 Mass. 505, 9 Am. St. Rep. 131, 97 Am. Dec. 117.

Michigan.—*McMillan v. Michigan, etc., R. Co.*, 16 Mich. 79, 93 Am. Dec. 208.

Minnesota.—*Hutchinson v. Chicago, etc., R. Co.*, 37 Minn. 524, 35 N. W. 433.

Missouri.—*Kellerman v. Kansas City, etc., R. Co.*, 136 Mo. 177, 34 S. W. 41, 37 S. W. 828; *Kirby v. Adams Express Co.*, 2 Mo. App. 369; *Snider v. Adams Express Co.*, 63 Mo. 376.

New Hampshire.—*Durgin v. American Express Co.*, 66 N. H. 277, 20 Atl. 328.

New York.—*Belger v. Dinsmore*, 51 N. Y. 166; *Germania F. Ins. Co. v. Memphis, etc., R. Co.*, 72 N. Y. 90, 28 Am. Rep. 115; *Giles v. Fargo*, 60 N. Y. Super. Ct. 117; *Hill v. Syracuse, etc., R. Co.*, 73 N. Y. 351, 29 Am. Rep. 163; *Kirkland v. Dinsmore*, 62 N. Y. 171, 20 Am. Rep. 475; *McMahon v. Macy*, 51 N. Y. 155; *Springer v. Westcott*, 78 Hun (N. Y.) 365.

North Carolina.—*Phifer v. Carolina Cent. R. Co.*, 89 N. Car. 311, 45 Am. Rep. 687.

South Carolina.—*Johnstone v. Richmond, etc., R. Co.*, 39 S. Car. 55, 17 S. E. 512, 55 Am. & Eng. R. Cas. 346.

Tennessee.—*Merchants', etc., Transp. Co. v. Bloch*, 86 Tenn. 392, 6 S. W. 881, 35 Am. & Eng. R. Cas. 579.

Texas.—*Ryan v. M., K. & T. Ry. Co.*, 65 Tex. 13, 57 Am. Rep. 589; *International, etc., R. Co. v. Watt*, 2 Tex. App. Civ. Cas. 686.

Vermont.—*Davis v. Central Vt. R. Co.*, 66 Vt. 290, 29 Atl. 313.

West Virginia.—*Baltimore & O. R. R. v. Rathbone*, 1 W. Va. 87, 88 Am. Dec. 664.

Wisconsin.—*Boorman v. American Express Co.*, 21 Wis. 152.

Bill of Lading.—A bill of lading is a contract between the shipper and the carrier for the transportation of the goods, to which the assent of the shipper will be presumed from the fact that he receives it. So held in *Davis v. Central Vt. R. Co.*, 66 Vt. 290, 29 Atl. 313.

By accepting a bill of lading without reading it, or without objection or protest against a stipulation therein purporting to limit the carrier's liability, the shipper will be presumed to have assented to its terms. So held in *Louisville & N. R. Co. v. Brownlee*, 77 Ky. (14 Bush.) 590.

Conclusively Presumed.—Where the shipper accepts and acts upon a bill of lading containing an express agreement limiting each carrier's liability to its line, his knowledge of such agreement will, in

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the absence of fraud or mistake, be conclusively presumed and he will be bound thereby, and will not be permitted to show he was ignorant of its contents. So held in *Mulligan v. Illinois Cent. R. Co.*, 36 Iowa 181, 14 Am. Rep. 514, 2 Am. Ry. Rep. 322, 328.

Bill of Lading Accepted and Acted upon.—Where a person receives from a common carrier a bill of lading purporting on its face to set forth the terms of carriage, and accepts and acts upon it without objection, ordinarily he will be presumed, as in other cases of contract, in the absence of fraud or other sufficient excuse, to have assented to its terms, so far as its provisions are lawful and not opposed to public policy. So held in *Cox v. Central Vermont R. Co.*, 170 Mass. 129, 49 N. E. 97.

Bill of Lading Retained without Objection.—The acceptance by the shipper, on the day of shipment, of a bill of lading for his goods containing lawful stipulations against responsibility for loss or damage, and retaining it without objection, raises a presumption, in the absence of anything to the contrary, that the shipper knew the contents of the receipt and assented to its terms. So held in *Dillard v. Louisville, etc., R. Co.*, 2 Lea (70 Tenn.) 288.

Bill of Lading Signed by Shipper.—A shipper who signs a bill of lading is, in the absence of fraud or deceit, conclusively presumed to know its contents and to have assented to its terms. So held in *Kellerman v. Kansas City, etc., R. Co.*, 136 Mo. 177, 34 S. W. 41, 37 S. W. 828.

Conditions in Body of Bill of Lading—Small Type.—The owner of freight's assent to conditions inserted in the body of the bill of lading, when he has had an opportunity to know its contents, has received it at the time of shipment, and the carrier has used no unfair means to deceive, will be conclusively presumed. And the mere fact that they are in small type do not render them invalid. So held in *Ryan v. M., K. & T. Ry. Co.*, 65 Tex. 13, 57 Am. Rep. 589.

Freight Receipt—Legal Presumption.—In the absence of fraud, concealment, or improper practices, the legal presumption is that stipulations limiting the common carrier's liability, contained in a receipt given by it for freight, are known and assented to by the shipper. So held in *Ballou v. Earle*, 17 R. I. 441, 22 Atl. 1113, 48 Am. & Eng. R. Cas. 31.

Possession of Receipt Only Prima Facie Evidence of Assent.—Possession by a shipper of a carrier's receipt for the freight, containing limitations of the carrier's common-law liability, is at least prima facie evidence of his assent to them, and in most cases may be conclusive. So held in *Morrison v. Phillips, etc., Co.*, 44 Wis. 405, 28 Am. Rep. 599.

Possession of Receipt Only Prima Facie Evidence of Assent—Parcel Evidence.—But the possession by the owner of goods shipped of the receipt of a railroad or express company, containing conditions restricting its liability as a common carrier, is only prima facie evidence

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that the owner assented to such conditions, and may be contradicted by parol evidence of the facts and circumstances. So held in *Strohn v. Detroit & M. Ry. Co.*, 19 Wis. 554; *Boorman v. American Express Co.*, 21 Wis. 152.

Express Receipt Acted upon without Dissent—Limiting Value.—In *Graves v. Adams Express Co.*, 176 Mass. 280, 57 N. E. 462, it is held that a common carrier may limit its liability in case of loss by stipulations as to the value of the property it undertakes to carry. And the only qualification is that the stipulation shall be brought home to the knowledge of the shipper under such circumstances that his assent to it can fairly be assumed to have been given; and if he accepts and acts upon it without dissent he will be presumed to have agreed to it; and, in this case, an action against an express company to recover the value of a box containing paintings of great value intrusted to it for carriage and delivery, and lost by it and never delivered, the plaintiff, on the undisputed facts, must be held to have assented to the limitation of the defendant's liability contained in the receipt; and the stamping by the messenger on the receipt of the words "value asked and not given," without the knowledge or consent of the plaintiff, was immaterial.

Limitations in Body of Express Receipt—Duty to Call Shipper's Attention—Duty to Read.—In *Snider v. Adams Express Co.*, 63 Mo. 376, it is held that it is not the duty of the agent of an express company, on giving a receipt for freight purporting to limit the company's liability, to call the shipper's attention to its language, and where such limitations are contained in the body of the receipt, in a way not calculated to escape observation, they compose a part of it, and the paper shows on its face that it is not a mere receipt, and, being accepted by the shipper in the transaction of the business to which it related, it was his duty to read it, and, in the absence of proof of fraud, imposition or deceit, the law presumes that he had notice of its contents.

Express Receipt—Burden on Shipper to Show Absence of Its Due Delivery and Assent.—Where an express company's receipt for freight, embodying conditions limiting the carrier's liability to a reasonable and lawful extent, is shown to have been in the custody of the shipper, a due delivery of it to him, and his assent to its terms, are to be presumed, and it is for him to show that there was no such delivery, or no such assent. So held in *Boorman v. American Express Co.*, 21 Wis. 152.

Passenger's Baggage—Application of Rule.—In *Steers v. Liverpool, etc., Co.*, 57 N. Y. 1, it is held that the rule, that, in the absence of fraud, concealment or improper practice, the legal presumption is, that stipulations contained in a common carrier's receipt for freight, restricting its common-law liability, were known and assented to by the person receiving it, applies to carriers of passengers with their baggage.

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Baggage—Presumed to Have Read Excursion Ticket.—Where a passenger accepts an excursion ticket in the form of a paper of some size, setting forth on its face clearly, prominently and legibly, a reasonable limitation of the carrier's liability as to baggage, unless special agreement be made, the passenger is presumed to have read the ticket, and will be bound by the limitation. So held in *Jacobs v. Central R. Co. (Pa.)*, 11 R. R. R. 562, 34 Am. & Eng. R. Cas., N. S., 562, 57 Atl. Rep. 982; *Graham v. Cummins*, 208 Pa. St. 535.

Rebuttal of Presumption—Failure to Read.—The delivery and acceptance of a bill of lading containing a provision purporting to limit the common-law liability of the carrier raises a presumption that the shipper assented to it; and such presumption is not overcome by evidence of his ignorance of the contents of the bill arising from failure to read it or to make some effort to ascertain its contents, in the absence of fraud or the use of means to prevent the shipper from fully understanding it. So held in *Schaller v. Chicago, etc., R. Co.*, 97 Wis. 31, 71 N. W. 1042.

Knowledge of Terms Not Implied.—But in *Saunders v. Southern Ry. Co. (C. C. A.)*, 11 R. R. R. 596, 34 Am. & Eng. R. Cas., N. S., 596, 128 Fed. Rep. 15, it is held that a contract purporting to limit a carrier's common-law liability, in order to accomplish such result, must have been accepted by the passenger with knowledge of its terms, and such knowledge will not be implied.

Tokens Given by Local Carriers in Exchange for Baggage Checks.—Tokens given by local carriers in exchange for baggage checks are not of such a nature as to put persons on their guard as to memoranda printed upon them, and persons receiving them are not presumed to know their contents or to assent to them. *Blossom v. Dodd*, 43 N. Y. 264, 3 Am. Rep. 701.

Limiting Value of Baggage—Local Carrier's Card.—The putting into the hands of a passenger, receiving her baggage for delivery at her residence, of a card containing a clause limiting the liability of the carrier to a specified amount, except by special agreement, to be noted on such card, will not, without further proof from which the assent of such passenger to the terms thereof may be implied, establish such a contract. So held in *Prentice v. Decker*, 49 Barb. (N. Y.), 21.

Local Carrier's Receipt for Baggage Check—Car Dimly Lighted—Limiting Value.—In *Madan v. Sherard*, 73 N. Y. 329, 29 Am. Rep. 153, it appeared that defendant's agent came into a railroad car, in which plaintiff was traveling, and called for baggage, and received the check for plaintiff's trunk with directions as to its delivery, and marked on a blank receipt the date, number of check, and place of delivery, which he handed to plaintiff, without anything being said as to its contents. The car was dimly lighted, so that plaintiff, where he was seated, could not have read the receipt; and, without looking at it or reading it, he put it into his pocket. The receipt was marked upon its margin

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"domestic bill of lading," and purported to be a contract exempting defendant from liability in certain specified cases, and limiting its liability, in the absence of a special contract, to \$100. It was held that defendant in order to relieve itself from full liability was bound to establish a contract upon the special terms contained in the receipt and that no such contract was created, as matter of law, from the mere acceptance of the receipt under such circumstances.

Baggage—Passenger Ticket Only Receipt or Token—Express or Implied Assent.—The ordinary passenger ticket is only a receipt or token; and in order that the purported conditions printed on such ticket may have the effect of limiting the carrier's common-law liability for loss of baggage, the carrier must show that the passenger when he paid for the ticket and received it, did it under such circumstances that he expressly or impliedly assented to such conditions. So held in *Ranchau v. Rutland R. Co.*, 14 Am. & Eng. R. Cas., N. S., 416, 71 Vt. 142.

Baggage Check—"Look on the Back"—Whether Read—Presumption.—In *Malone v. Boston & W. R. Corp.*, 78 Mass. (12 Gray), 388, 74 Am. Dec. 598, it is held that there is no presumption of law that a railroad passenger has read a notice limiting the liability of the railroad for baggage, printed upon the back of a baggage check delivered to him, having on its face the words "look on the back," and also printed on a placard posted in the cars, and containing other notices which he had read.

Limiting Value—Value Not Stated.—A stipulation in a receipt given by a common carrier for freight, limiting the liability of the carrier to a specified sum in case of loss or damage, where the value of a package is not stated, does not constitute an agreement as to the value of the package, and the inference is to the contrary. So held in *Michalischke v. Wells Fargo & Co.*, 118 Cal. 683, 50 Pac. 847.

F. SHIPPER'S KNOWLEDGE OR ASSENT—BURDEN OF PROOF.

But the burden is upon the carrier claiming the benefit of a contract purporting to limit its liability to prove the shipper's express or implied assent to the restriction.

United States.—*The Guildhall* (D. C.), 58 Fed. Rep. 796; *Seller v. The Pacific, Deady* (U. S.), Fed. Cas. No. 12644.

Illinois.—*Adams Express Co. v. King*, 3 Ill. App. 316; *Adams Express Co. v. Stettaners*, 61 Ill. 184, 14 Am. Rep. 57; *Boscowitz v. Adams Express Co.*, 93 Ill. 523, 34 Am. Rep. 191; *Chicago, etc., R. Co. v. Davis*, 159 Ill. 53, 42 N. E. 382; *Chicago, etc., Ry. Co. v. Calumet Stock Farm*, 194 Ill. 9, 1 R. R. R. 162, 24 Am. & Eng. R. Cas., N. S., 162, 61 N. E. 1095; *Chicago & N. W. Ry. Co. v. Simon*, 160 Ill. 648, 43 N. E. 596; *Erie & W. Transp. Co. v. Dater*, 91 Ill. 195, 33 Am. Rep. 51; *Merchants', etc., Transp. Co. v. Joesting*, 89 Ill. 152; *Western Transit Co. v. Hosking*, 19 Ill. App. 607; *Western Transp. Co. v. Newhall*, 24 Ill. 466, 76 Am. Dec. 760.

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Kentucky.—Adams Express Co. *v.* Hoeing, 88 Ky. 373, 11 S. W. 205; Louisville, etc., R. Co. *v.* Owen, 12 Ky. L. Rep. 716, 19 S. W. 590.

Mississippi.—Southern Express Co. *v.* Moon, 39 Miss. 822.

Ohio.—Pittsburgh, etc., R. Co. *v.* Blakemore, 1 Ohio Cir. Ct. 42, 1 O. C. D. 26.

Delay—Exemption—Reduced Rate—Knowledge and Assent.—Where a carrier of live stock seeks to avoid liability for delay in transporting and delivering cattle under a claim that plaintiff shipped the stock under a contract by which a lower rate was charged, in consideration of which defendant was exonerated from damages for negligent delay beyond the actual expense incurred, defendant had the burden of proof to show that plaintiff knew, at the time of the shipment, the rates charged and the conditions under which the rate was made, and that he agreed to ship at such rate. So held in *Baltimore & O. R. Co. v. Whitehill* (Md.), 22 R. R. R. 176, 45 Am. & Eng. R. Cas., N. S., 176.

G. ASSENT NOT IMPLIED FROM ACCEPTANCE OF RECEIPT OR BILL OF LADING.

In Illinois and Ohio, and under the Georgia statute, the general rule is directly opposed, and the express assent of the shipper to a limitation of the carrier's liability contained in a freight receipt or bill of lading accepted by him is essential to its validity.

Georgia.—Central R., etc., Co. *v.* Hasselkus, 91 Ga. 382, 17 S. E. 838; Central of Georgia Ry. Co. *v.* Lippman, 110 Ga. 665, 18 Am. & Eng. R. Cas., 53 N. S., 640; Georgia R. Co. *v.* Spears, 66 Ga. 485, 42 Am. Rep. 81; Kavanaugh *v.* Southern R. Co., 120 Ga. 62; Southern Express Co. *v.* Barnes, 36 Ga. 532; Southern Express Co. *v.* Purcell, 37 Ga. 103, 92 Am. Dec. 53.

Illinois.—Adams Express Co. *v.* Bratton, 106 Ill. App. 563; Adams Express Co. *v.* Haynes, 42 Ill. 89; Adams Express Co. *v.* Stettaners, 61 Ill. 184, 14 Am. Rep. 57; Anchor Line *v.* Dater, 68 Ill. 369; Atchison, etc., R. Co. *v.* Bilinsky, 107 Ill. App. 504; Boscowitz *v.* Adams Express Co., 93 Ill. 523, 34 Am. Rep. 191; Chicago, etc., Ry. Co. *v.* Calumet Stock Farm, 194 Ill. 9, 1 R. R. R. 162, 24 Am. & Eng. R. Cas., N. S., 162, 61 N. E. 1095; Chicago, etc., R. Co. *v.* Davis, 159 Ill. 53, 42 N. E. 382; Chicago, etc., R. Co. *v.* Simon, 160 Ill. 648, 43 N. E. 596; Elgin, etc., R. Co. *v.* Bates Machine Co., 98 Ill. App. 311; Erie & W. Transp. Co. *v.* Dater, 91 Ill. 195, 33 Am. Rep. 51; Erie R. Co. *v.* Wilcox, 84 Ill. 239, 25 Am. Rep. 451; Field *v.* Chicago, etc., R. Co., 71 Ill. 458; Illinois Cent. R. Co. *v.* Carter, 165 Ill. 570, 46 N. E. 374; Illinois Cent. R. Co. *v.* Frankenberg, 54 Ill. 88, 5 Am. Rep. 92; Merchants' Despatch Transp. Co. *v.* Furthman, 149 Ill. 66, 36 N. E. 624; Merchants', etc., Transp. Co. *v.* Joesting, 89 Ill. 152; Merchants', etc., Transp. Co. *v.* Leysor, 89 Ill. 43; Merchants', etc., Co. *v.* Theilbar, 86 Ill. 71; United States Express Co. *v.* Haines, 67 Ill. 137.

Ohio.—Davidson *v.* Graham, 2 Ohio St. 131; Gaines *v.* Union

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Transp., etc., Co., 28 Ohio St. 418; *Mack v. Great Western Despatch*, 2 Ohio Cir. Dec. 22; *Pittsburgh, etc., R. Co. v. Barrett*, 36 Ohio St. 448, 3 Am. & Eng. R. Cas. 256; *Pittsburgh, etc., R. Co. v. Blakemore*, 1 Ohio Cir. Ct. 42, 1 O. C. D. 26.

Notice of Claim within Specified Time—Proof of Assent.—A stipulation in a bill of lading which exempts the carrier from liability unless notice is given of the damage within a specified time, is one of the matters forbidden by section 2068 of the Georgia Code, and is not effectual without proof of assent thereto by the shipper. So held in *Central R., etc., Co. v. Hasselkus*, 91 Ga. 382, 17 S. E. 838.

Express Receipt Not Evidence of Express Contract—Statute.—In *Southern Express Co. v. Newby*, 36 Ga. 635, 91 Am. Dec. 783, it appeared that appellant gave a receipt acknowledging the delivery of certain goods "to be forwarded," and expressing in the receipt that the company would not be liable for any loss from any cause whatever, except for fraud or gross negligence, and that where the value of the property was not specified in the receipt the company would not be liable for a sum exceeding fifty dollars for each package. It was held that the receipt was evidence only of the reception of the goods by the company for the purposes therein specified, and was not evidence of an express contract; that such an express contract as is contemplated by Ga. Rev. Code, Sec. 2042, could not be proved in such way; and that the giving of the receipt and the acceptance of it by the shipper did not relieve the company from the liability imposed by the law upon common carriers.

Must Be Clear Proof of Assent.—There must be clear proof that the shipper expressly assented to restrictions upon the carrier's common-law liability contained in the shipping contract, or the shipper, notwithstanding notice of such intended restriction, may insist that the carrier shall transport his goods burdened with the responsibilities incident to its common-law employment. So held in *Adams Express Co. v. Bratton*, 106 Ill. App. 563.

Where a carrier seeks to avoid liability by virtue of a clause in a bill of lading purporting to limit its liability, it has the burden of showing that the consignor assented to the terms of such clause. So held in *Elgin, etc., Ry. Co. v. Bates Machine Co.*, 98 Ill. App. 311.

Must Prove Understanding and Intentional Assent.—Where a limitation of the common-law liability of a carrier appears only in the bill of lading or receipt given to the shipper, however clearly expressed, the mere fact of its acceptance without objection by the shipper is not conclusive of his assent to it; it being necessary to show in order to bind him that he accepted it with a full understanding on his part of the restriction, and intentionally assented to it. So held in *Wabash R. Co. v. Harris*, 55 Ill. App. 159.

Shipper without Alternative.—In *Anchor Line v. Dater*, 68 Ill. 369, it is held that it does not necessarily follow, because the carrier de-

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livers to the shipper a receipt for goods to be transported containing limitations of his liability, that the shipper assents to such conditions, as he has no alternative but to accept such a receipt as the carrier may give.

Limiting Liability to Own Line—Bill of Lading Not Signed by Shipper.—A common carrier cannot limit its liability to its own line by a mere restriction in a bill of lading not signed by the shipper, without proof that the shipper accepted the same and consented to the limitation. So held in *Illinois Cent. R. Co. v. Carter*, 165 Ill. 570, 46 N. E. 374.

Unsigned Notice on Back of Receipt.—A receipt for goods given to the shipper by the carrier, upon the back of which is an unsigned notice purporting to limit the carrier's liability, is not a contract of shipment binding the shipper. So held in *Merchants' Despatch Transp. Co. v. Furthmann*, 149 Ill. 66, 36 N. E. 624.

Acceptance of Bill of Lading and Previous Practice of Receiving Similar Bills—Not Conclusive.—In *Erie & W. Transp. Co. v. Dater*, 91 Ill. 195, 33 Am. Rep. 51, it is held that the acceptance of a bill of lading containing a condition purporting to limit the carrier's liability and the previous practice of giving and receiving similar bills of lading, are evidence tending to show that the limitation of liability therein was assented to by the shipper, but neither one nor both such facts would be conclusive evidence thereof.

Exemption—Loss by Fire.—The mere fact that the bill of lading given by the carrier to the shipper contains a clause purporting to exempt the carrier from loss of the freight by fire, cannot be held conclusive of such a contract. So held in *Merchants', etc., Transp. Co. v. Leysor*, 89 Ill. 43.

Bill of Lading—Absence of Evidence of Assent in Appeal Record.—Where, in an action for injuries to horses shipped on defendant's railway, defendant contends that its liability was limited by a bill of lading which in its entirety constituted both a receipt and a contract, but there was no evidence in the record that the plaintiff assented thereto, he could not be held bound thereby. So held in *Chicago, etc., Ry. Co. v. Calumet Stock Farm*, 1 R. R. R. 162, 24 Am. & Eng. R. Cas., N. S., 162, 61 N. E. 1095, 194 Ill. 9.

Limiting Value—Express Receipt Not Signed by Shipper—Loss by Fraud or Negligence.—An express company's receipt for freight, stating that, in no event shall the holder demand beyond the sum of \$50, at which the article forwarded is valued, "not signed by the shipper and no statement made by him as to value," is not a valid stipulation against a loss by fraud or negligence. So held in *Jacobson v. Adams Express Co.*, 1 Ohio Cir. Dec. 212.

Bill of Lading Not Signed by Owner or Consignor—Pleading and Proof.—Where a carrier claims an exemption from its common-law liability, under a bill of lading not signed by the owner or consignee of the freight, it must aver and prove that the bill was assented to by

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the shipper. So held in *Gaines v. Union Transp., etc., Co.*, 28 Ohio St. 418.

Negligence—Insertion of Condition in Bill of Lading—Shipper's Assent.—In *The Guildhall* (D. C.), 58 Fed. Rep. 796, it is held that the insertion of a condition against the consequences of negligence in a bill of lading, and the receipt by the consignee of the goods under such bill, are not sufficient evidence of such assent to the condition by the shipper or consignee as to make it a contract.

H. SHIPPER'S ASSENT—QUESTION FOR JURY.

It is sometimes held that it is a question for the jury whether a shipper assented to a contract accepted by him without objection. *Adams Express Co. v. Haynes*, 42 Ill. 89; *American Merchants' Union Express Co. v. Schier*, 55 Ill. 140; *Anchor Line v. Dater*, 68 Ill. 369; *Boscowitz v. Adams Express Co.*, 93 Ill. 523, 34 Am. Rep. 191; *Chicago & W. Ry. Co. v. Calumet Stock Farm*, 194 Ill. 9, 1 R. R. 162, 24 Am. & Eng. R. Cas., N. S., 162, 61 N. E. 1095; *Chicago, etc., Ry. Co. v. Montford*, 60 Ill. 175; *Field v. Chicago, etc., R. Co.*, 71 Ill. 458; *Lake Shore, etc., Ry. Co. v. Davis*, 16 Ill. App. 425; *Merchants', etc., Co. v. Theilbar*, 86 Ill. 71.

Contract Signed by Shipper.—Where a restriction of the carrier's liability is made by a condition in a bill of lading made as a receipt by the carrier, notice of the condition and assent to it by the shipper is a question of fact, to be determined by the evidence; but where the restriction is contained in a contract signed by the shipper, the contract is to be construed by the court. So held in *Coles v. Louisville, etc., R. Co.*, 41 Ill. App. 607.

Baggage—Limiting Value—Notice on Back of Passenger Ticket—Passenger's Knowledge—Question for Jury.—In *Brown v. Eastern R. Co.*, 65 Mass. (11 Cush.), 97, it is held that a notice that a railroad would not "be liable for the baggage of passengers beyond a certain amount, unless, etc.," printed on the back of the passenger's ticket, and detached from what ordinarily contains all that is material to the passenger to know, does not raise a legal presumption that the party at the time of receiving the ticket and before the train leaves the station, had knowledge of such restrictions of its liability which the carrier had so attempted to attach to the carriage of baggage; but that it is a question for the jury whether the passenger knew of the notice before commencing the journey.

At Owner's Risk—Car Found to Be Loaded with Confederate Horses—Knowledge of Circumstances.—A suit was brought against the Western & Atlantic Railroad for the loss of personal property delivered to them at Dalton for transportation to Atlanta; and plaintiff proved that the property sued for was put on board the railroad cars, and was lost. The evidence for the defense consisted, in part, of an original receipt, or notice, as follows: "Received of Mr. W. C. Sanders (stating the property), for shipment to Atlanta, at his own

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risk," and the testimony of defendant's agent which showed that, at the time, General Johnston's army was in Dalton, and the cars were taken by the military at their pleasure; and that shipment of private freight was generally understood to be at the owner's risk, and that all shippers knew that it was not uncommon for the military to take the cars and throw such freights out, and that he believed that defendant knew of the risk, and that he had to take it. It further appeared that the car loaded with plaintiff's goods at Dalton was found next morning in Atlanta, loaded with Confederate horses, and part of plaintiff's goods were found lying near the depot at Dalton. Upon this statement of facts, the trial court charged the jury that the stipulation in such receipt, that the property was shipped at owner's risk, was no protection to the road, unless the property was proven to have been taken by the Confederate army from the cars. It was held that such charge, under the facts, was too narrow a view of the law providing for express contracts by railroads; that there were facts in this case arising not only from the presence of an army, but the character of the receipt given, and the evidence of the agent as to plaintiff's knowledge and consent thereto, which ought to have been submitted to the jury under the evidence, to say whether or not he had knowledge of the contents and consented thereto, for this would limit the liability, if the jury believed from the evidence that it was an express contract. And whether it was not was a question for the jury, which ought to have been submitted to them under all the evidence in the case. *Wallace v. Sanders*, 42 Ga. 486.

I. EXPRESS CONTRACT.

1. General Rule.

As a general rule, a limitation of the common-law liability of a carrier cannot be implied, and a contract claimed to contain such a restriction must be in express and unequivocal terms. *Gott v. Dinsmore*, 111 Mass. 45; *Pittsburgh, etc., R. Co. v. Barrett*, 36 Ohio St. 448, 3 Am. & Eng. R. Cas. 256.

Not Responsible for Delay—Negligent Delay.—A provision in the shipping contract that the carrier will not be responsible for delay in the carriage of the freight, will not relieve it from liability on account of delay caused by negligence. To constitute such an exemption it must be expressly stipulated for in the contract. So held in *Jennings v. Grand Trunk Ry.*, 127 N. Y. 438, 28 N. E. 394.

Intention to Exempt—Language of Receipt Must Be Unequivocal.—A receipt signed by a common carrier for goods entrusted to it for carriage, purporting to limit its liability, will not be construed as exempting it from liability for loss or damage caused by negligence with respect to the agencies employed by it, unless the intention to so exempt the carrier is expressed in the receipt in plain and unequivocal terms. So held in *Hooper v. Wells Fargo & Co.*, 27 Cal. 11, 85 Am. Dec. 211.

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Conditions Stamped upon Bill of Lading.—In *Merriman v. The May Queen* (D. C.), Fed. Cas. No. 9,481, it appeared that a bill of lading had stamped upon it "Goods to be receipted for on the levee—not responsible for rust, breakage, leakage, cooperage—weight and contents unknown," and the witness who received the goods stated "that the vessel would not be responsible for breakage." It was held that this was not such a certain and specific contract as is required to restrict the carrier's liability.

Contract Executed by Shipper.—But in *Chicago, etc., R. Co. v. Hale*, 2 Ill. App. 150, it is held that an instruction that unless the consignor assented and knowingly intended to assent to the limitations of the carrier's liability in the shipping contract, the carrier would not be relieved from its common-law liability; and that the jury were to determine whether the consignor understood the terms of the shipping receipt, is erroneous, for although this may be the rule where the consignee merely took a receipt containing such limitations, yet where a contract is executed and signed by the shipper, and there is no reason why it should not be held valid, it is not a question to be left to the jury to determine whether or not the consignor understood its terms.

2. Connecting Carriers.

(a) **Initial Carrier's Liability Limited to Own Line.**—The rule in the United States requiring an express contract does not apply where an initial carrier claims that its liability was limited to its own line, and that it is not liable for loss of or injury to freight which occurred on a connecting line after it had delivered it to a connecting carrier. Where the contract is not for through transportation, and it is silent on the subject, the initial carrier is not liable for any loss or damage which occurs after the freight has left its line. See first foot-note appended to *Roy v. Chesapeake & O. Ry. Co.* (W. Va.), 26 R. R. R. 231, 49 Am. & Eng. R. Cas., N. S., 231; *Cincinnati, etc., Ry. Co. v. Greening* (Ky.), 26 R. R. R. 235, 49 Am. & Eng. R. Cas., N. S., 235, 100 S. W. 825; note, 13 Am. & Eng. R. Cas., N. S., 187, et seq.

In the United States the rule established in most of the states, including Vermont, is that a railroad company, as a common carrier, is liable for injuries that occur beyond the termination of its own road, only when it stipulates to deliver the property at a point beyond. *Morse v. Brainard*, 41 Vt. 550, 552.

English Rule.—In England the rule is that where a railroad company, as common carriers, receives property directed to a point beyond the termination of their own road, they are bound to deliver it at its place of destination, without a stipulation to that effect, and if the railroad would avoid such obligation they must do it by a stipulation limiting their liability to injuries happening upon their own road. *Morse v. Brainard*, 41 Vt. 550, 552.

Limiting Liability to Own Line—Failure of Shipper to Notice Terms of Bill of Lading—Goods Marked for Shipment beyond Initial Line—Receipt of Freight for Entire Route.—In *Stevens v. Lake Shore*,

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etc., Ry. Co., 11 Ohio Cir. Dec. 168, 20 Ohio Cir. Ct. 41, it is held that where stipulations in a bill of lading are consistent with common-law liability, as where it limits the carrier's liability to its own line, and the shipper seeks to impose greater liability upon the carrier, the fact that the shipper may not have noticed the terms of the printed bill of lading, is not enough to warrant a departure from such terms, and the imposition of a greater obligation on the carrier, because of an implied undertaking arising out of the circumstances of the acceptance of the goods by the carrier marked for shipment beyond its line and the receipt of freight charges for the whole distance; and especially is this so where the shipper is aware, at the time of shipment, that the destination is beyond the carrier's line, in which case the shipper is bound to know that if any obligation is imposed upon the carrier beyond its own line it must be by contract extending its common-law liability.

Freight Paid for Entire Distance—Shipper's Knowledge That Railroad Ended at Intermediate Point—Accident on Steamer.—In *Washburn & M. Mfg. Co. v. Providence, etc., R. Co.*, 113 Mass. 490, it appeared that goods were delivered to a railroad company to be carried to New York, and the freight was paid to it for the entire distance; that the goods were receipted for as "for transportation;" but that the shipper knew that the railroad terminated at an intermediate point, where the freight was to be carried the rest of the way by a steamer of another carrier; and that the freight money was to be divided between the carriers. In an action against the railroad for damages to the goods, happening upon the steamer, it was held that defendant was not a common carrier beyond the end of its road, and was not liable.

Usual Course of Business Known—Consignee's Address Incorporated in Receipt Signed by Initial Carrier Merely for Purpose of Identification.—In *Wright v. Boughton*, 22 Barb. (N. Y.) 561, it appeared that defendants were common carriers from Lewiston to Niagara by trains and wagons, but had no interest in, or connection with, any of the carrying business or companies beyond the falls; that the Buffalo & N. F. R. Co. carried freight between the falls and Buffalo, and goods destined for Detroit and places on the Michigan Cent. R. Co. were, at Buffalo, usually shipped upon some boat to Detroit, etc.; that the course of business, in this respect, was generally known, and that defendants received from plaintiff, at Lewiston, two quarter casks of brandy, and gave the following receipt: "Received, Lewiston, Aug. 12, 1852, from W., C. & Co. or, etc., the following packages of goods on board the L. & B. R. line, in good order, to be delivered in like good condition." In the left hand margin, under this, was "Israel Kellogg, Mich. M. C. R. R." and opposite, on the right hand, "1 qr. cask brandy." Below this address was the following, in the left hand margin, "McGrea & Morton, Battle Creek, Mich. M. C. R. R." and opposite at the right hand, "1 qr. cask brandy."

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Shipping bills were signed by W., C. & Co. corresponding with this receipt. Cards were put upon the casks, marked upon one, thus, "Israel Kellogg, Kalamazoo, Mich. M. C. R. R." and upon the other, "McCrea & Morton, Battle Creek, Mich. M. C. R. R." The casks of brandy were duly delivered by the defendants to the Buffalo & N. F. R. Co. at the falls, and that company transported them to Buffalo, and shipped them on board a steamer of the Michigan C. R. Co. line, and the steamer and brandy were lost and sunk in Lake Erie. It was held that the receipt signed by defendant did not contain any agreement to transport the brandy to Kalamazoo or Battle Creek, but not liable for the loss which occurred after the property had passed that it was only intended to embrace the route occupied by them as common carriers, the address being incorporated in the instrument merely for the purpose of identification, and that defendants were out of their hands.

Limiting Liability to Own Line—Use by Station Agent of Blank Receipts Furnished by Shipper instead of Those Furnished by Railroad—Authority of Agent.—In *Burroughs v. Norwich, etc., R. Co.*, 100 Mass. 26, 1 Am. Rep. 78, it appeared that the officers of a railroad whose route connected with the route of a steamboat company supplied blanks to their station agents to receipt for goods to be transported from their stations to points on the connecting route, in a form which provided that the freight should be transported by the railroad company to the end of its own route, and thence by the steamboat company, and that in case of loss or damage to the freight the company alone should be responsible in whose actual custody it might be at the time of the occurrence of the loss or damage; that instead of using such blanks, one of the station agents, without the knowledge of the railroad's officers, and without special authority, was accustomed to give to a person who shipped goods from time to time from that station to points on the connecting route receipts on blanks furnished by such person in a form by the terms of which the railroad was made to promise to forward and deliver the goods to the order of his consignee at those points. It was held that the railroad company was not bound as a common carrier of such goods beyond the end of its route, by virtue of receipts so taken.

Ambiguity—Parol Evidence—Limiting Liability to Own Line.—Where a receipt, given by a railroad company for goods to be transported to a consignee at a point beyond the terminus of its line, contained the words, "Care R. R. Agt. Callahan," this was an ambiguity which could be explained by parol, and if it appeared that the words meant that the goods were to be delivered to the agent of another road at Callahan, and that the first company was bound only for such delivery, there would be no liability upon the first company beyond that point. So held in *Savannah, etc., Ry. Co. v. Collins*, 77 Ga. 376, 3 S. W. 416, 4 Am. St. Rep. 87.

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Bills of Lading Received by Consignor from Connecting Lines.—

Where the consignor of property which a railroad company agreed to transport from one point to another, partially over connecting lines, signed and received from the connecting lines bills of lading in which they assumed all liability, there was sufficient evidence that the consignor did not regard the initial carrier as having assumed a carrier's liability for the entire distance. So held in *Hartley v. St. Louis, etc., R. Co.* (Iowa), 1 R. R. R. 569, 24 Am. & Eng. R. Cas., N. S., 569, 89 N. W. 88.

Initial Carrier Limiting Liability to Own Line—Where Connecting Lines under One Management, etc.—But in *Gulf, etc., Ry. Co. v. Wilbanks*, 7 Tex. Civ. App. Rep. 489, it appeared from the allegations of the petition that appellant and its connecting lines were under one management, and were associated for the purpose of doing business as common carriers from the initial point in Texas to Chicago, the terminal point of shipment; that such an arrangement made appellant and its associates practically one line, and each liable for the negligence or fault of the other respecting through shipments of freight over such lines. It was held that in such case, the initial carrier could not, by a stipulation in the through shipment contract, restrict its liability for damages to such only as occurred on its own line.

Forwarder's Liability—Negligence of Steamboat Owned and Controlled by Other Carriers, but Generally Used by Defendant Carrier.—In *Hooper v. Wells Fargo & Co.*, 27 Cal. 11, 85 Am. Dec. 211, it is held that if a common carrier, who undertakes to transport goods, "and deliver to address," inserts a clause in the receipt for the freight, signed by it alone, and given to the person intrusting it with goods, stating that the carrier is "not to be responsible except as forwarder," such clause does not exempt the carrier from liability for loss of the goods occasioned by the carelessness or negligence of the employees on a steamboat owned and controlled by other parties than such carrier, but ordinarily used by him in his business of carrier, as a conveyance; the managers and employees of the steamboat being, in law, for the purpose of the transportation of such goods, the managers and employees of the carrier.

Agreement to Carry beyond Own Line—Delays on Connecting Lines—Negligence—Application of Exemption.—It appeared that defendant agreed to carry goods to a point beyond its own lines, and that the contract provided that the carrier should not be liable for delays occurring on connecting lines. It was held that defendant was not exempt from damages for delays on connecting lines resulting from their negligence. *Jennings v. Grand Trunk Ry. Co.*, 5 N. Y. Supp. 140, 23 N. Y. S. R. 15, 52 Hun. 227.

Limiting Liability to Own Line—Express Receipt—Notice to Shipper.—In *Mosher & Co. v. Southern Express Co.*, 38 Ga. 37, it appeared that the agent of defendant at Augusta, Ga., receipted for a

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package to the shipper, marked "C. A. Robinson, Cartersville, Ga.," and in the printed receipt given by the agent of defendant to the shipper, the following words were inserted: "Which it is mutually agreed is to be forwarded to our agency nearest or most convenient to destination only, and there delivered to other parties, to complete the transportation." It was held that in case of loss of the goods, the defendant express company was liable therefor, and could not protect itself from its legal liability by showing that its line of transportation extended only to the city of Atlanta, especially when the evidence in the record shows that such fact was not known to the shipper, or communicated to him, at the time of receiving the goods by the agent of defendant.

Initial Carrier's Liability—Part of Goods Put on Cars Where Second Road Begins.—Where goods received at one place are to be transported over several distinct lines of railroad to another and distant one, and the common carrier owning the first road undertakes to carry goods over the entire line, part of the goods being put aboard the cars on its line, and a part to be put on at its termination and where the next road begins, the fare asked and agreed to be paid being, however, the fare usually paid for the carriage over the whole line, and the contract being for transportation over the whole line, and not carriage to the end of the first line and then for delivering to the carrier owning the next road, and for carriage by him, the fact that a part of the goods were put on the cars only where the second road begins will not exonerate the owner of the first road from liability for their loss. So held in *Ogdensburg, etc., R. Co. v. Pratt*, 22 Wall. (U. S.) 123.

(b) Connecting Carrier Entitled to Benefit of Initial Carrier's Contract.—And the better supported doctrine seems to be that a connecting carrier is entitled to the benefit of all the conditions of the original shipping contract entered into by the consignor and initial carrier, where such contract is silent on the subject of the connecting carrier's liability, or does not expressly deprive him of the advantage of conditions limiting the initial carrier's liability.

United States.—*Deming v. Norfolk, etc., R. Co.*, 21 Fed. Rep. 25, 16 Am. & Eng. R. Cas. 232; *Evansville & Crawfordsville R. Co. v. Androscoggin Mills*, 22 Wall. (U. S.) 594; *Fairbanks v. Cincinnati, etc., R. Co.*, 66 Fed. Rep. 471; *Woodward v. Illinois Cent. R. Co.*, 1 Biss. (U. S.) 447.

Alabama.—*Jones v. Cincinnati, etc., R. Co.*, 89 Ala. 376, 8 So. 61, 45 Am. & Eng. R. Cas. 321; *Western R. Co. v. Harwell*, 91 Ala. 340, 8 So. 649.

Arkansas.—*St. Louis, etc., R. Co. v. Lesser*, 46 Ark. 236; *St. Louis, etc., R. Co. v. Weakly*, 50 Ark. 397, 8 S. W. 134, 35 Am. & Eng. R. Cas. 635, 7 Am. St. Rep. 104; *Taylor v. Little Rock, etc., R. Co.*, 39 Ark. 148, 18 Am. & Eng. R. Cas. 590.

Kansas.—*Kiff v. Atchison, etc., R. Co.*, 32 Kan. 263, 4 Pac. 401, 18 Am. & Eng. R. Cas. 618.

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Missouri.—*Halliday v. St. Louis, etc., R. Co.*, 74 Mo. 159, 41 Am. Rep. 309, 6 Am. & Eng. R. Cas. 433.

New York.—*Lamb v. Camden, etc., T. Co.*, 2 Daly (N. Y.) 454; *Maghee v. Camden, etc., R. Co.*, 45 N. Y. 514; *Manhattan Oil Co. v. Camden, etc., Co.*, 54 N. Y. 197; *Ricketts v. Baltimore, etc., R. Co.*, 4 Lans. (N. Y.) 446; *Robinson v. New York, etc., Co.*, 75 N. Y. App. Div. 431; *Schiff v. New York Cent., etc., R. Co.*, 52 How. Pr. 91; *White v. Weir*, 33 N. Y. App. Div. 145; *Whitworth v. Erie R. Co.*, 87 N. Y. 413, 6 Am. & Eng. R. Cas. 349.

Pennsylvania.—*Fairchild v. Philadelphia, etc., R. Co.*, 148 Pa. St. 527, 24 Atl. 79.

Tennessee.—*Bird v. Southern R. Co.*, 99 Tenn. 719, 42 S. W. 451.

Texas.—*International, etc., R. Co. v. Mahula*, 1 Tex. Civ. App. 182, 20 S. W. 1002.

Where one transportation company receives from another freight to be carried from one place to another, under a contract between the latter company and the owner, it is entitled to the benefit of all stipulations in such contract affecting its liability. So held in *Manhattan Oil Co. v. Camden, etc., Co.*, 52 Barb. (N. Y.) 72.

Where Contract Contemplates Employment of Connecting Carrier.—Where a transportation contract of a common carrier contemplates the employment of a connecting carrier to complete the transportation, the latter upon receiving the property for carriage will be entitled to the benefit of all valid restrictions upon the carrier's liability provided for in such contract. So held in *Halliday v. St. Louis, etc., Ry. Co.*, 74 Mo. 159, 41 Am. Rep. 309, 6 Am. & Eng. R. Cas. 433.

Limiting Value—Through Bill of Lading Issued.—Where a railroad company issues a through bill of lading, in which its liability is limited to an agreed valuation, and which contains a clause declaring that this carrier's responsibility is to cease upon delivery in good order at its terminus in the direction of the destination to a connecting carrier, and an accident results while the property is in the hands of the connecting carrier, the limitation of liability applies in favor of the carrier in whose control the property is injured. So held in *Fairchild v. Philadelphia, etc., R. Co.*, 148 Pa. St. 527, 24 Atl. 79.

Intermediate Carrier Entitled to Benefit of Any Agreement with Initial Carrier.—An intermediate carrier is entitled to the benefit of any agreement entered into by the owner of the goods with the initial carrier, qualifying or limiting the common-law responsibility, and will be regarded as taking the goods for carriage upon the same conditions and subject to the limitations or exceptions that are contained in such agreement. So held in *Lamb v. Camden, etc., T. Co.*, 2 Daly (N. Y.) 454.

Steamboat Bill of Lading Signed by Agents of Connecting Railroad.—In *Woodward v. Illinois Cent. R. Co.*, 1 Biss. (U. S.) 447, it is held that a steamboat bill of lading for the shipment of goods at Memphis, to be delivered at Cairo, specifying the rate of freight

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through to Baltimore, and signed by the agents of the connecting railroad company, is a contract for through shipment; and the railroad company is entitled to the benefit of the exemptions or limitations of liability for loss or damage to the freight contained in the bill of lading.

Limiting Liability to Own Line—Benefit of Intermediate Carrier.—A stipulation in a contract for the shipment of goods over several connecting lines, that in case of loss or damage that road in whose actual custody the goods are at the time of the loss or damage shall alone be responsible, inures to the benefit of an intermediate carrier which delivers the goods safely to the next succeeding carrier. So held in *Bird v. Southern R. Co.*, 99 Tenn. 719, 42 S. W. 451.

Same—Refusal to Deliver at Destination—Liability of Initial Carrier's Lessor.—In *International, etc., R. Co. v. Mahula*, 1 Tex. Civ. App. 182, 20 S. W. 1002, it appeared that the M. P. Ry. Co., holding a lease upon the I. & G. N. Ry. Co., contracted to carry stock from a point in Texas, and safely deliver the animals at a certain point in Missouri; that the shipping contract restricted the liability to losses upon its own line; and that the stock was carried to its destination, but not delivered to the shipper. It was held, in an action against the I. & G. N. Ry. Co., that such limitation in the contract would inure to the benefit of each carrier over whose line the horses were carried, and defendant was not liable for the refusal to deliver the stock at its destination.

"At Owner's Risk"—Received for Transportation by Initial Carrier's and Other Railroads.—In *Kiff v. Atchison, etc., R. Co.*, 32 Kan. 263, 4 Pac. 401, 18 Am. & Eng. R. Cas. 618, it appeared that a railroad company received freight to be transported to a point beyond its own line of railroad, over its own and other lines of railroad connecting with it, and gave the shippers its receipt stating the freight was shipped "at owner's risk." It was held that such receipt was a special contract limiting the liability of the carrier; that such connecting railroads were entitled to the benefits of the exemption of liability specified in it; and that neither of the companies owning such connecting lines was liable for damages to the freight, unless it was shown that such damages arose from the negligence of the railroad company sought to be charged therewith.

Through Contract—Definition—Rights of Final Carrier.—In *White v. Weir*, 53 N. Y. Supp. (N. Y. Sup. Ct. Div.), 465, it appeared that the bill of lading given by an express company to a consignor, upon receipt of goods addressed to a consignee in another city, contained the company's agreement to forward them to its agency most convenient to the destination, and there deliver them to other parties to complete the transportation, payment for the entire carriage to be collected from the consignee upon final delivery. It was held that this was a through contract, and the final carrier was, therefore, entitled to an exemption given by the bill of lading from liability for damages to the goods.

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Loss by Fire While in Depots—Destroyed in Terminal Carrier's Freight House.—In *Manhattan Oil Co. v. Camden, etc., Co.*, 52 Barb. (N. Y.) 72, it appeared that freight was delivered to a company at C., under a contract between such company and the owner, to receive it and carry it to New York; that such contract contained a provision that the company receiving the freight should not be liable for damage or loss by fire or other casualty, while the property was in depots or places of transshipment; that the property, after being carried by said company to P., was delivered to defendant carrier, to be carried to New York, and there delivered; and that the freight, having been carried to New York and stored in defendant's freight house, was there, on the evening of its arrival, destroyed by fire, without any negligence on the part of defendant, and before any notice of its arrival had been given to the owner. It was held that defendant was entitled to the benefit of all the restrictions of liability contained in the shipping contract, as much so as the initial carrier, and, therefore, was not liable for the destruction of the goods.

Fire Clause—Right of Intermediate Railroad to Benefit of Contract Made with Steamboat Companies—Cotton Shipped from Memphis to New York and Liverpool.—In *Whitworth v. Erie Ry. Co.*, 87 N. Y. 413, 6 Am. & Eng. R. Cas. 349, it appeared that plaintiff shipped at Memphis various lots of cotton for carriage to Liverpool, under through contracts with certain dispatch companies and steamboat companies, the former contracting to carry the cotton to Jersey City. The bills of lading contained stipulations to the effect that the respective companies "and their connections" should not be liable for loss or damage to the property by fire while in transit, or while in deposit or places of transshipment, or at depots or landings at points of delivery. Defendant's road found part of a continuous line of railroad from Memphis to New York, and as intermediate carrier it received the cotton for transportation over its line, and carried it to Jersey City, where a portion of it while in its freight house was destroyed by fire. Defendant was not a member of either of the dispatch companies, and the latter were not owners of any of the railroads over which the cotton was transported, but used them in the performance of their contracts. It was held that defendant was entitled to the benefit of such restrictions of liability in the bills of lading, and was not liable unless the fire resulted from its negligence.

Fire Clause in Red Ink Applicable to Whole Route—Where Contracting Carrier's Road Only Formed Intermediate Link in Chain.—In *Evansville & Crawfordsville R. Co. v. Androscoggin Mills*, 22 Wall. (U. S.) 594, it appeared that the E. & C. R. Co. of Indiana, owning a railroad running from the south line of that state northward to another point in it, and which made a line of road by which cotton was brought from Columbus, Miss., to Boston, Mass., established, apparently with the view of procuring freights over its road, an agency in the former place and there was in the habit of contract-

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ing for the transportation of cotton from Columbus to Boston, its own road providing one link of the chain for transportation. Planters in Columbus shipped from that place to manufacturers in Boston a quantity of cotton. The bill of lading, dated at Columbus, Miss., and signed by the agent at Columbus of the railroad company, had in display letters at its top—"Evansville and Crawfordsville Railroad Company." "Great through fast freight route to all points north and east, via Pennsylvania Central, Erie, and New York Central Railroads. Contract for through rate. This reliable through line makes the shipment of cotton a specialty, and guarantee quick time and delivery in good order." The bill after stating the destination of the cotton to Boston, Mass., went on to say: "The Evansville and Crawfordsville Railroad Company hereby agree that upon arrival at Evansville, and delivery of the property, they will receive and forward said property to destination upon the following conditions: That the shipper, owner, and consignee do hereby release the said company and the boats and railroads with which they connect, from the acts of Providence, or from damage or loss by fire or other casualty while in depots or places of transshipment, also damage or delays by unavoidable accidents; also, loss by fire, collision, or dangers of navigation, or for loss or difference in weights, torn baggage, or condition of said property." "The Evansville and Crawfordsville railroad company will not be liable for loss or damage by fire, from any cause whatever." This last exemption was in italics and printed in red ink. It was held that such exemption in red ink applied to the whole route, between Columbus and Boston, and not the part alone between Columbus and Evansville; and that the cotton having been burned between Columbus and Evansville, without fault of the railroad company, the exemption in red ink applied, and absolved the company from liability for the loss.

Where Initial Carrier Contracts Also for Connecting Lines.—In *Western Ry. Co. v. Harwell*, 91 Ala. 340, 8 So. 649, it is held that where freight is received by a carrier for carriage over its own road, under a contract limiting its liability by special exemptions, a connecting carrier, receiving the property at the terminus of the first road, cannot claim the benefit of these exemptions for injuries happening on its own road; but when the initial carrier contracts for the through transportation of the freight over connecting lines to its destination, or, by authority of the connecting lines, fixes the compensation for the entire transportation, the special exemptions of the contract inure to their benefit, unless otherwise expressly limited, and also when the initial carrier, while limiting its liability to its own road, contracts also for its "connecting lines," and it is declared that the exemptions shall inure to the benefit of the connecting lines, "unless they shall otherwise stipulate on receiving the goods."

Where Receipt Given by Connecting Carrier to Initial Carrier Contained Different Provisions.—But in *Browning v. Goodrich Trans-*

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portation Co., 78 Wis. 391, 47 N. W. 428, it appeared that the receipt by a carrier for freight contained restrictions upon its liability, and provided that the same should inure to the benefit of any connecting carrier. A connecting carrier, on receiving the freight, gave the initial carrier a receipt containing different provisions. It was held that the liability of the connecting carrier for the loss of the goods depended upon the terms of the latter receipt and it could not avail itself of the provisions of the former one.

Where Invalidity of Condition Is Apparent.—Where a bill of lading shows upon its face the invalidity of clauses purporting to limit the carrier's liability, a connecting carrier can claim no more under it than the carrier who issued it. So held in *St. Louis, etc., Ry. Co. v. Spann*, 57 Ark. 127, 20 S. W. 914.

Termination of Liability as Carrier—Right of Initial Carrier to Stipulate on Behalf of Connecting Carrier.—A railroad company, as an initial carrier, as a condition for an undertaking to deliver freight beyond the terminus of its line, may stipulate on its own behalf and that of the connecting carrier, that the liability of each shall terminate upon the arrival of the goods at the station of delivery, and that afterwards their liability shall be that of warehouseman only. So held in *Kansas City, etc., Ry. Co. v. Sharp*, 64 Ark. 115, 40 S. W. 781.

Where Connecting Carriers Are Partners.—But where connecting carriers are partners in the transmission of freight, a condition in the shipping contract that the company shall not be liable for injuries to the property after it has passed beyond its line does not absolve it from responsibility for the injuries. So held in *Gulf, etc., Ry. Co. v. Wilson*, 7 Tex. Civ. App. 128, 26 S. W. 131.

(c) **Minority Doctrine.**—But in some jurisdictions it is held that where the contract limits the liability of the initial carrier, but is silent on the subject of the liability of any connecting carrier, no connecting carrier is entitled to the benefit of the restrictive clause of such contract. *Adams Express Co. v. Harris*, 120 Ind. 73, 21 N. E. 340, 40 Am. & Eng. R. Cas. 151; *Bancroft v. Merchants' Despatch Transp. Co.*, 47 Iowa 262, 29 Am. Rep. 482.

Limiting Value—Rights of Intermediate Carrier.—In *Martin v. American Express Co.*, 19 Wis. 336, it appeared that the United States Express Co. received a package at New York to be delivered at Madison, Wis., and transferred it to the American Express Co. at Buffalo, N. Y., that being the most Western point to which the United States Express Co. then carried packages destined for Wisconsin. The receipt given by the United States Express Co. declared that it would not be liable for any loss or damage of any package for over \$150, unless the just and true value thereof was stated in such receipt. It was held that the American Express Co. was not a party to such contract and was not entitled to such limitation of liability.

Ultimate Destination Mentioned in Receipt—Payment of Freight for Entire Distance at Destination.—In *Camden & A. R. Co. v. Forsyth*

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Bros. & Co., 61 Pa. St. 81, it appeared that the Pennsylvania R. Co. gave a receipt for oil to be delivered "at the company's freight station, Philadelphia." Appended to the receipt as, "Rate to Red Hook, 65 cents. * * * This oil is carried only on open cars and entirely at owner's risk from fire and leakage while in possession of the railroad company or carriers, while standing or in transit." The freight was to be paid at Red Hook. It was held that mentioning Red Hook as the ultimate destination and payment of the freight there, was at most no more than an engagement to forward to that place; that the limitations in the contract as to the liabilities of the Pennsylvania R. Co. applied only to that portion of the route on which they acted as carriers, not to that with reference to which they were forwarders; and that the exemption from liability as to oil affected only the Pennsylvania R. Co.

Limiting Value—Rights of Terminal Carrier—Contract Must Make Terminal Carrier Agent of Initial Carrier.—In order for a common carrier, by whom the transportation begun on a preceding connecting line is to be completed, to take the benefit of a special contract between the shipper and the initial carrier, limiting liability in case of loss to a stipulated value per hundred pounds, it must appear either that the contract was such as to bind the initial carrier for full performance, so as to make the second carrier the agent of the first, or else that the reduced rate forming the consideration of the special contract was not confined to the line of the first carrier, but was, either by the contract itself or by the act of the second carrier in rating and billing the goods over his line, extended and applied to that line also. So held in *Central Railroad, etc., Co. v. Bridger*, 94 Ga. 471, 20 S. E. 349.

Through Contract—Mere Fact That Contract Fixes Price for Entire Transportation.—The *Ætna Ins. Co. v. Wheeler*, 49 N. Y. 616, it is held that where a common carrier contracts for the transportation of freight over its route, and for the delivery thereof to another carrier to be forwarded over connecting lines to its ultimate destination, the fact that the contract fixes the price for the transportation does not make the contract a through contract, so as to entitle the succeeding carriers to the benefit of exceptions from liability contained in the contract.

Use of Printed Blanks—Written Portions Controlling—Description of Goods—Ultimate Destination Given.—In *Babcock v. Lake Shore, etc., Ry. Co.*, 49 N. Y. 491, it is held that where a common carrier undertakes for a specified compensation to transport over his own route, and to deliver at the terminus thereof goods marked to a consignee beyond such terminus, a through contract will not be imputed from the fact that in the description of the goods in the contract the marks showing the ultimate destination is given. Nor is such a contract affected by the fact that in making it a printed blank is used adapted to a through contract extending over other and connecting lines, and

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making the contract to read ostensibly for and on behalf of all the carriers over whose lines the goods may pass. The written portions of the contract will control, and only so much of the printed matter in the blank form used as is consistent therewith is of any effect; all that is incompatible with or inappropriate to the intent of the parties as indicated by the written portions is to be rejected.

Bill of Lading Issued at Cincinnati Conditioned to Deliver at "Toledo for Detroit"—**Liability of Terminal Carrier.**—Where a bill of lading was issued at Cincinnati conditioned to deliver certain goods "at Toledo for Detroit," the contract was to carry to Toledo and forward from there to Detroit, and when the defendant railroad company received the goods at Toledo they received them, in the absence of any clause limiting the liabilities beyond that point, under its common-law liability, irrespective of the terms of the bills of lading applicable during the transit from the initial point to Toledo, except that it would not be authorized to collect of plaintiffs any larger freights than the sum specified. So held in *McMillan v. Michigan, etc., R. Co.*, 16 Mich. 79, 93 Am. Dec. 208.

"Above Named (Railroad) Companies"—**Rights of Local Carrier.**—Where a railroad company, having printed blanks for receipts for transporting goods over its road, and by other railroads, to one place, received goods to be carried to another place, and at its terminus to be delivered to a different company, receipted for the goods, and, without erasing the names of the other companies, used words of exemption from liability, they being, "between the shipper and the above named companies," it was held that the company receiving the goods from the railway company, not being one of "the above named companies," could not take the benefit of the exemptions in the receipt given. *Merchants' Despatch Transp. Co. v. Bolles*, 80 Ill. 473.

Purporting to Inure to Benefit of Any Connecting Carrier.—But a shipping receipt, limiting the carrier's liability, accepted by the owner or his agent, in consideration of a reduced freight rate, is not only a receipt, but also a special contract as to conditions of transportation and if it purports to inure to the benefit of any connecting carrier who in fact receives the goods, it is valid for that purpose. So held in *Mears v. New York, etc., R. Co.*, 75 Conn. 171.

J. NEED NOT BE SIGNED BY SHIPPER.

In the absence of a statutory requirement, a special contract limiting the liability of a common carrier need not be signed by the consignor to render the restriction binding on him and the consignee. *Adams Express Co. v. Haynes*, 42 Ill. 89; *Chicago, etc., Ry. Co. v. Montfort*, 60 Ill. 175; *United States Express Co. v. Haines*, 67 Ill. 137.

Receipt—Understandingly Assented to.—A clause in the receipt given by the carrier to the shipper for the freight, purporting to limit the liability of the carrier to its own line, if understandingly assented

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to by the shipper, will as effectually bind him as if he had signed it. So held in *Erie Ry. Co. v. Wilcox*, 84 Ill. 239, 25 Am. Rep. 451.

Same—Full Understanding, and Intent to Assent.—Where a shipper takes a receipt for his goods from a common carrier, which contains stipulations purporting to limit the liability of the carrier, with a full understanding of such conditions, and intending to assent to them, he is as much bound by such stipulation as if he had signed the contract with full knowledge and assent. So held in *Anchor Line v. Dater*, 68 Ill. 369.

Bill of Lading Signed by Railroad's Agent Only—Parol Testimony.—A bill of lading signed by the railroad company's receiving agent, and accepted and acquiesced in by the consignor, is binding upon the latter, although not signed by him, and the terms of the contract expressed therein cannot be varied by parol proof. So held in *Cincinnati, etc., R. Co. v. Pontius*, 19 Ohio St. 221, 2 Am. Rep. 391.

Bill of Lading—Opportunity of Knowing Contents.—In *Mouton v. Louisville, etc., R. Co.*, 128 Ala. 537, it is held that a bill of lading given by a common carrier on the delivery of goods to it for transportation, limiting its common-law liability, if accepted by the shipper or consignor with knowledge of its contents, or with reasonable opportunity of acquiring such knowledge, constitutes a special contract, and it is not necessary in order to make the contract binding between the parties, that it should have been signed by the consignor or shipper, or that the carrier should have been notified that its terms were accepted by the shipper or consignor.

"Special Contracts"—Application of Statute.—Bills of lading are not "special contracts" within the meaning of section 1261, C. C., providing that "the obligations of a common carrier * * * may not be limited by special contract," unless they are signed by the consignor or consignee. So held in *Hartwell v. Northern Pac. R. Co.*, 5 Dak. 463, 41 N. W. 732.

Contract Signed by Shipper.—But a shipper signing a contract containing lawful restrictions of the carrier's liability cannot relieve himself of its terms by reason of ignorance of them, unless there be fraud or misapprehension in the execution of the contract. So held in *Coles v. Louisville, etc., R. Co.*, 41 Ill. App. 607.

Receipt Signed by Shipper—Knowledge of Contents—Burden of Proof.—The burden of proof is upon the carrier to show that the shipper, in signing a shipping receipt containing a clause purporting to limit the carrier's common-law liability, understood the contents of the instrument he was signing. So held in *Atchison, etc., R. Co. v. Bilinsky*, 107 Ill. App. 504.

K. CUSTOM TO LIMIT LIABILITY—EFFECT OF SHIPPER'S KNOWLEDGE.

Under the rule that such a contract must be express, the mere fact

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that the shipper knew that it was the custom of the carrier to always undertake to transport freight under contracts restricting its liability will not have the effect of limiting the carrier's liability with respect to a particular shipment made by such shipper without an express contract.

Usage or Custom Known to Shipper.—Neither usage or custom, though known to the shipper, which he has not clearly assented to as a condition of the contract of shipment, can be set up to absolve a carrier from his common-law liability. So held in *Pittsburgh, etc., R. Co. v. Barrett*, 36 Ohio St. 448, 3 Am. & Eng. R. Cas. 256.

Any Number of Previous Instances.—The sending of goods under a special contract limiting the carrier's liability in any number of instances will not bind the party sending them to similar terms in the future, without an express agreement. So held in *McMillan v. Michigan, etc., R. Co.*, 16 Mich. 79, 93 Am. Dec. 208.

Custom of Merchants—Effect on Written Contract.—Evidence of the custom of merchants of a particular place is inadmissible to contradict, or in any way limit or affect, the carrier's liability under a written contract of the parties, as contained in the bill of lading. So held in *Turney v. Wilson*, 7 Yerg. (Tenn.), 340, 27 Am. Dec. 515.

Previous Knowledge of Owner of Conditions in Bills or Receipts Usually Given.—In *London, etc., Fire Ins. Co. v. Rome, etc., R. Co.*, 75 N. Y. Sup. Ct. Rep. (68 Hun), 598, 52 N. Y. S. R. 581, it is held that a carrier who fails to give a receipt, or to make any other contract for the shipment of property, will not be absolved from liability for its destruction by evidence that the owner or his agent previously knew of conditions in the shipping bills or receipts usually given, which would discharge the carrier from liability for the loss sustained.

Previous Acceptance of Large Number of Similar Bills of Lading.—The assent of a shipper to conditions in a receipt or bill of lading given by the carrier on the receipt of goods for carriage, purporting to limit the liability of the carrier, will not be conclusively inferred from the fact of the previous acceptance by the shipper of a large number of similar bills of lading, not filled up by the shipper or held in his possession to be filled up. So held in *Erie & W. Transp. Co. v. Dater*, 91 Ill. 195, 33 Am. Rep. 51.

Similar Bills of Lading Previously Accepted by Shipper—Limiting Liability to Own Line.—A special contract protecting a railroad company against liability for loss of or injury to freight not occurring on its own line will be presumed from the fact that a clause purporting to so limit its liability is to be found printed in the bill of lading received by the shipper, even though his attention was not called to it, if it appears that he had previously shipped like articles and taken the same kind of bills of lading. So held in *East Tenn., etc., R. Co. v. Brumley*, 5 Lea (73 Tenn.) 401, 6 Am. & Eng. R. Cas. 356.

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Invalid Custom.—If the law imposes a duty upon a common carrier neglect of which would give the shipper right to damages, a custom refusing or limiting such damages, or a custom that they should be expressly relinquished, would be invalid. So held in *Missouri Pac. R. Co. v. Fagin*, 72 Tex. 127, 9 S. W. 749.

Loss Caused by Mob—Shipper's Knowledge of Custom—Absence of Evidence.—In *Little v. Fargo*, 50 N. Y. Sup. Ct. (43 Hun), 233, the defendant carrier claimed that its undertaking, as a common carrier, was qualified by a special agreement by which the plaintiff assumed all risk of injury by delivery and loss that might be occasioned by mob, riot or insurrection, and sought to support this claim by proving the method and course adopted by the company in carrying on its business, which was that the receipts from the railway company for goods delivered at the freight depot to be carried by defendant, were presented by the consignor to the agent of the defendant company, and bills of lading taken from it expressing the contract and limiting the liability of the defendant. It was held that as there was no evidence given which would warrant the conclusion that plaintiff had knowledge of such custom, defendant's liability was not affected by it.

L. SHIPPER CHARGEABLE WITH NOTICE.

But in *Ghormley v. Dinsmore*, 53 N. Y. Super Ct. 56, and in *Rubens v. Ludgate Hill Steamship Co.*, 20 N. Y. Supp. 481, it is held that the shipper's knowledge of the fact that a stipulation limiting the carrier's liability is usually contained in a bill of lading or freight receipt will charge the shipper with notice that it is also contained in the bill of lading or receipt which he has acceptance from the carrier.

Delivery of Goods—Duty Modified by Usage—Knowledge of Consignor Burden of Proof.—The duties and liabilities of a common carrier, in regard to the delivery of goods intrusted to him, may be modified by the particular usage of the carrier; and if he rely upon and prove such usage, as a defense in an action brought against him by the consignor of goods, it is not necessary that he should prove that the consignor had knowledge of such usage. So held in *Farmers' and Mechanics' Bank v. Champlain Transp. Co.*, 18 Vt. 131.

General Custom of Port—Unloaded upon Wharf—Termination of Liability.—A general custom of a port, that "after the vessel arrives at the port and goes to a wharf designated by the consignee, and due notice has been given to the consignee, and the cargo is taken off and distributed upon the wharf according to the marks and numbers, the care of the goods devolves then upon the consignee," is valid. So held in *Pickering v. Weld*, 159 Mass. 522, 34 N. E. 1081.

Goods Deposited by Express Company on Railroad Depot Platform—"Owner's Risk" Inserted in Receipt without Shipper's Knowledge.—An express company in depositing goods on the platform of

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a railroad depot at their destination, without delivering them to the consignees, or placing them in the custody of any person, is guilty of gross negligence, and is liable as a common carrier for their loss although the express company's agent, to whom they were tendered by the consignor's messenger for shipment, at first declined to receive them, because the company had no agent at the place of destination, and was not allowed to use the depot of the railroad company, and although the shipping agent, in signing the receipt, added the words "owner's risk," but without the knowledge or consent of the consignor, and although the consignee, when he ordered the goods to be forwarded by the express company, knew that the company had no agent at the place of destination, and he had lately received goods forwarded by it under receipts containing the same added words. So held in *Southern Express Co. v. Armstead*, 50 Ala. 350.

Limiting Liability to Own Line—Usage to Deliver Goods at Its Terminus—Knowledge of Shipper—Amount of Freight Collected.—But although a railroad company received goods marked and destined to a point beyond the terminus of its own line, and did not expressly limit its liability to carry the goods to such terminus, if the company shows that it was its unvarying usage to deliver the goods at the terminus of its road; that it only undertook to transport over its own line; and that this fact was known to the shipper, and if, moreover, it charged the shipper freight, and collected it from him for transportation over its own road only, such facts would be sufficient to rebut the inference of an implied contract to carry the freight to its destination and deliver it to the consignee. So held in *Western & A. R. Co. v. McElwee*, 53 Tenn. (6 Heisk.) 208.

Limiting Liability to Own Line—Habit of Receiving Like Bills of Lading.—When a bill of lading, given by the carrier on the acceptance of the goods, shows that they are to be forwarded to a particular place only, which is short of their place of destination, and the consignor has been a frequent shipper by the same line, and was in the habit of receiving like bills of lading, it will be presumed he was familiar with its contents, and knew that the carrier was not obliged to carry the goods to the place to which they were addressed, and if promptly carried to the place specified in the contract, and there safely stored, and they are burned without fault on the part of the carrier, no recovery can be had of the latter for the loss. So held in *Merchants', etc., Transp. Co. v. Moore*, 88 Ill. 136.

MISCELLANEOUS.

Stipulations Stamped upon Bill of Lading.—Stipulations stamped on the face of a bill of lading before its delivery to the shipper, and by express terms included therein, become a part of the contract. So held in *Montague v. The Henry B. Hyde* (D. C.), 82 Fed. Rep. 681.

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Shipping Directions Given by Shipper—Similarity of Bill of Lading—Evidence of His Knowledge.—In *Lake Shore, etc., Ry. Co. v. Davis*, 16 Ill. App. 425, it appeared that, at the time of the delivery of freight for transportation, the shipper gave to the carrier certain shipping directions in which were contained the same terms and conditions limiting the carrier's common-law liability as were inserted by the carrier in the bill of lading. It was held that such shipping directions were evidence strongly tending to prove knowledge on the part of the shipper of the terms of the bill of lading as well as his assent thereto; and that an instruction which held that unless the shipper's attention was called to the terms of the bill of lading at the time he received it, he was not bound by them, and which ignored the effect of such shipping directions as evidence of knowledge and assent, was erroneous.

Receipt Prepared by Shipper—Knowledge of Custom and Circumstances.—When a person desiring to ship cotton, soon after the end of the civil war, when the W. & A. R. R. had but little rolling stock and refused to ship except upon contracts limiting its liability, and the agents of the connecting line, knowing the facts, had the same kind of receipts, containing a contract to limit liability, which were used by the W. & A. R. R., and said agents were also the agents of the shipper, who procured a blank receipt from them and filled it up himself, and carried it to the depot agent of said road, and got him to sign the receipt as prepared by the shipper and to ship the cotton. It was held that this was an express contract by which the shipper as well as the railroad was bound, as both parties had a fair opportunity to understand its terms, when it was entered into by them, and both acted upon it and agreed to be bound by it. *Wallace v. Matthews*, 39 Ga. 617, 99 Am. Dec. 473.

Failure to State Value—Appearance of Package—Waiver.—Where the printed receipt for freight given by the carrier to the shipper contains stipulations limiting the carrier's liability to a certain sum, unless the value of each package is named, and stated therein, if the size or appearance of a package fairly indicates that its value is greater than the sum so named, the carrier will be presumed to waive the necessity of stating a value, unless the attention of the shipper is called to the conditions, and the value of the package is required to be given. So held in *Southern Express Co. v. Crook*, 44 Ala. 468, 4 Am. Rep. 140.

"Dangers of the River"—Scope of Exemption—Custom—Parol Evidence.—In *Sampson v. Gazzon*, 6 Port. (Ala.), 123, 30 Am. Dec. 578, it is held that parol proof is admissible to show that the words "dangers of the river," in a bill of lading, are, by the usage and custom of merchants and others, understood to include other casualties than those arising from the element of water. See also, *McClure & Co. v. Cox, Brainard & Co.*, 32 Ala. 617, 70 Am. Dec. 552.

Same—Fire.—Parol evidence is admissible to show that the words

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"dangers of the river," as used in a bill of lading, by usage and custom include dangers by fire. So held in *Hiller v. McCartney*, 31 Ala. 501.

Same—Seizure of Boat by Armed Men.—Where the only limitation of the carrier's liability specified in the bill of lading is "dangers by the river," parol evidence cannot be received to show a custom among the persons who were engaged in navigating the river, which exempted the owners of the boat from liability for loss caused by the forcible and illegal seizure of the boat by a body of armed men, without fault or neglect on the part of the officers or crew. So held in *Boom & Co. v. Steamboat Belfast*, 40 Ala. 184, 88 Am. Rep. 761.

Baggage—Money—Ignorance of Carrier's Rule—Carrier Bound by Agent's Act.—Where a passenger, who is ignorant of the rules of a railroad forbidding its agents to receive money for transportation as baggage, delivers to the baggage agent more money than the carrier is required to transport, and informs the agent of the amount, the carrier's common-law liability will attach, if the agent undertakes to ship it as baggage, and a loss occurs. So held in *St. Louis S. W. Ry. Co. v. Berry*, 60 Ark. 433, 30 S. W. 764.

Bill of Lading—Absence of Question as to Shipper's Knowledge—Presumption.—In *Anchor Line v. Knowles*, 66 Ill. 150, it appeared that a person shipped goods to be carried by water as well as by land, and received a bill of lading containing a provision that the carrier should not be liable for loss or damage to the property by fire or other casualty, while in transit or at depots or landing at the point of delivery, and the goods were safely carried to their destination, and there safely stored in a suitable warehouse, where they were destroyed by fire, on the night of the next day, without any fault on the part of the carrier. It was held that, as there was no question made as to the knowledge of the shipper of the provision in the bill of lading, it would be inferred that he received it with knowledge of its contents, and agreed to its terms, and consequently the carrier was not liable.

Limiting Value—Express Agent Informed That Article Is of Greater Value than That He Is Allowed to Insert in Receipt.—In *Adams Express Co. v. Carnahan*, 29 Ind. App. 606, it appeared that plaintiff left her diamond earrings at the home of her sister-in-law, and requested her to send them to plaintiff. Her sister-in-law took the earrings to the express office and informed the agent that the package contained diamond earrings and were very valuable. The agent for the purpose of fixing the value of the package and the charge thereon, inquired of her whether the value was \$50, and informed her that the express charges would be twenty-five cents on that valuation. Thereupon she informed the agent that the package was far more valuable than that. To the further inquiry as to whether she would value the package at \$100 she informed the agent that he might place it at that amount, but that it was far more valuable than that,

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and the agent wrote the value in the receipt \$100. The receipt contained the provision: "Nor in any event shall the holder thereof demand beyond the sum of \$50, at which the above property is valued, unless otherwise herein expressed." It was held that the liability of the company was limited to \$100.

Shipper's Knowledge or Assent—Circumstantial Evidence.—In attempting to prove the shipper's knowledge of, or assent to the terms of the bill of lading, the carrier may prove all the circumstances surrounding the transaction which have any tendency to establish such knowledge or assent. *Lake Shore, etc., R. Co. v. Davis*, 16 Ill. App. 425.

Evidence—Estoppel—Freight Receipt Provision Introduced by Plaintiff.—In *Springer v. Wescott* (N. Y. Sup. Ct.), 29 N. Y. Supp. 149, an action against an express company for goods lost while in its possession, it is held that a provision of a freight receipt limiting the amount of recovery in case of loss, is binding on plaintiff where she introduced it for the purpose of establishing her case.

Receipt Filled in by Owner or Clerk—Notice—Assent.—The fact that the owner of goods, by himself or clerk, filled up a receipt taken for goods shipped, is evidence tending to show that the shipper had notice of the limitations of the carrier's liability in the printed part thereof and assented to them, but is not conclusive on such question. So held in *Boscowitz v. Adams Express Co.*, 93 Ill. 523, 34 Am. Rep. 191.

Evidence of Custom to Vary Common Bill of Lading.—In *The Reeside* (C. C.), Fed. Cas. No. 11,657, 2 Summ. 567, it is held that evidence was not admissible to vary the common bill of lading, by the terms of which the freight was to be delivered in good order and condition, the danger of the seas only excepted, by establishing the existence of a custom that the owners of packet vessels between New York and Boston should be liable only for damage to goods occasioned by their own neglect.

Custom of Carrier—Evidence—Limitation Not in Contract.—In *McMillan v. American Exp. Co.* (Iowa), 10 R. R. R. 453, 33 Am. & Eng. R. Cas., N. S., 453, 98 N. W. 629, it is held that evidence of a custom of a carrier in issuing contracts for the transportation of live stock is inadmissible to impose a limitation of the carrier's liability not provided for in the contract of shipment.

Baggage—Pullman Car Ticket—Action against Railroad Company.—In *Louisville & N. R. Co. v. Katzenberger*, 84 Tenn. 380, 57 Am. Rep. 232, it appeared that plaintiff purchased a railroad ticket, and also a Pullman car ticket over the defendant railroad; that the Pullman car ticket had printed upon its face, "wearing apparel or baggage placed in the car will be entirely at the risk of the owners." Plaintiff turned his valise over, on entering the Pullman car, to the porter. At a certain point of the journey the valise was missed and could not be found. It was held that, in a suit against the railroad company

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alone, such condition printed on the Pullman car ticket would have no bearing on the case.

Blank Receipt of Another Express Company Filled Up by Shipper's Clerk and Signed by Carrier's Agent.—In *Boscowitz v. Adams Express Co.*, 93 Ill. 523, 34 Am. Rep. 191, it appeared that the clerk of a shipper of goods took with him to an express office a blank receipt of a different express company, containing a printed clause purporting to limit the liability of the latter company, and inserted the articles and numbers, etc., therein, writing the name of the company with whom he was shipping over that of the other company which was signed by the agent of such company. It was held that this constituted no contract with the company receiving the goods, limiting its liability; and that before the latter company could claim the benefit of the exemption contained in the receipt of the other company whose blank receipt was used, it must be proved by evidence outside of the receipt that such was the agreement of the parties.

Limiting Liability to Own Line—Effect of Giving Through Rate.—In *McEacheran v. Michigan Cent. R. Co.*, 101 Mich. 284, 59 N. W. 612, it appeared that the shipper delivered freight to defendant railroad company, consigned to a point beyond its line, and received a bill of lading, in which it was stated that the lumber was received for transportation to its destination, if upon such company's line of road, otherwise, to the place where it should be received by the connecting carrier, upon the terms and conditions appearing upon the back of the bill of lading. Among such conditions was one providing that the railroad in forwarding the lumber from the point where it left its road, was to be held as a forwarder only. It was held that the mere fact that the company gave the shipper a through rate for freight would not, in view of the terms expressed in the bill of lading, upon which it received the freight, make the railroad company liable as a carrier beyond its own line.

Delivery of Goods after Notice to Stop in Transitu—Tort Limitation Not Applicable.—In *Rosenthal v. Weir*, 170 N. Y. 148, 63 N. E. 65, an action against a common carrier for its negligence in delivering goods after notice from the shipper to stop them in transitu, which it agreed to do, it was held that the action was founded upon the tort of defendant, not upon the shipping contract, which ended upon the receipt of such notice by the carrier of defendant's liability for loss to an amount specified therein would not preclude a recovery to the extent of the value of the goods.

Contract upon Printed Blank of Form in General Use—Rule of Construction.—In *Grand v. Livingston*, 4 N. Y. App. Div. Rep. 589, it is held that the rule of construction that effect should be given to all the language employed in a contract could not be deemed to apply strongly to a case where a shipping contract, purporting to limit the carrier's liability, was upon a printed blank of a form in general use all over the county and one which was usually executed by the shipper without careful consideration of its language and effect.

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Goods Consigned to Person Having Special Contract with Carrier—Ratification—Notice.—In *White v. Goodrich Transp. Co.*, 46 Wis. 493, it is held that one who ships his own goods consigned to a person who has a special contract with the carrier for the carriage of goods at reduced rates at the owner's risk, and afterwards accounts with his consignee for the freight charges paid by the latter on the goods at reduced rates, will not be held to have ratified the contract, as one for the carriage of such goods at his risk, unless it appears that he had notice of such contract.

IV. FAIRNESS ESSENTIAL.

A. FAIRNESS AND FREEDOM OF CHOICE

A contract purporting to limit the liability of a common carrier, in order to have that effect, must have been entered into by the shipper without duress and have been fairly made by the carrier in all other particulars; such contracts not being favored by the law, and the shipper not occupying as advantageous a position as the carrier when entering into the contract.

Illinois.—*Chicago, etc., R. Co. v. Bozarth*, 94 Ill. App. 69.

Indiana.—*Adams Express Co. v. Carnahan*, 29 Ind. App. 606; *Evansville, etc., R. Co. v. Kevekordes* (Ind. App.), 69 N. E. 1022; *St. Louis, etc., R. W. Co. v. Smuck*, 49 Ind. 302.

Mississippi.—*Illinois Cent. R. Co. v. Lancashire Ins. Co.*, 79 Miss. 114, 21 Am. & Eng. R. Cas., N. S., 840, 30 So. 43; *Southern Express Co. v. Moon*, 39 Miss. 822.

Missouri.—*Kellerman v. Kansas City, etc., R. Co.*, 68 Mo. App. 255; *Wyrick v. Missouri, etc., R. Co.*, 74 Mo. App. 406.

North Carolina.—*Gwyn Harper Mfg. Co. v. Carolina Cent. R. Co.*, 128 N. Car. 280.

Texas.—*Southern Pac. R. Co. v. Anderson*, 26 Tex. Civ. App. 518, 63 S. W. 1023.

Duress—Imposture—Delusion—Understanding of Shipper.—In *Adams Express Co. v. Nock*, 63 Ky. (2 Duv.), 562, 87 Am. Dec. 510, it is held that public policy imposes on common carriers a constructive liability peculiarly stringent, and they will not be permitted to limit such liability by special contracts, unless they are fairly made, without duress, imposture, or delusion, and are fully understood by the other party, and are clearly proved.

Fair Dealing—Unequal Positions of Parties.—The duty of railroads to the public and the shipper requires that obligations and engagements which they enter into for transportation shall be based upon contracts that are essentially fair, just, and reasonable, not only to the carrier but the shipper. The unequal positions of the parties in their contractual relations to each other commends the wisdom of the rule that requires the carrier to deal fairly with the shipper, and prevents it from imposing unfair contracts upon him. So held in *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677.

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Shipper's Assent—Elements—Printed Receipts Thrust upon Shipper in Press of Railroad Travel.—To render a special contract purporting to limit the common-law liability of a common carrier binding upon the shipper, the latter's assent to it must be express, and upon a sufficient consideration, and be freely and fairly given with a full knowledge of the contract and of the legal rights thereby waived, and not obtained by the fraud or circumvention or artfully contrived printed receipts thrust upon the shipper in the hurry and press of railroad travel, or under other circumstances not favorable to a full understanding of the force and effect of the contract. So held in *Southern Express Co. v. Moon*, 39 Miss. 822.

Written Contract—Whether Fairly Made—Extrinsic Evidence.—A written contract, purporting to have been entered into for the purpose of limiting a common carrier's common-law liability, is not conclusive upon the question whether it was fairly and honestly entered into, but extrinsic evidence may be resorted to in determining such question. So held in *O'Malley v. Great Northern Ry. Co.*, 86 Minn. 380.

Baggage—Limiting Value—Ticket Provision—Failure to Call Attention—Theft—Conversion.—A provision purporting to limit the carrier's liability for loss of a passenger's baggage to \$50, in a ticket for first cabin passage across the Atlantic, in a first class steamship, is unreasonable, especially where such restriction was not called to the attention of the passenger, and the loss resulted from theft or conversion by the carrier's servants. So held in *The New England (D. C.)*, 110 Fed. Rep. 415.

Limiting Value—Duress—Obliged to Sign to Obtain Reduced Rate—Fraud—Remarks of Carrier's Clerk.—In *Jennings v. Smith (C. C.)*, 106 Fed. Rep. 139, it appeared that a shipper applied to the general freight agent of a railroad company for the same reduced rate on live stock which he had previously received, and was granted it, on the same conditions as before, one of which was that he should execute the written contract usual in such cases. When the shipment was ready, the shipper was tendered, by a clerk, a written contract for his signature, in which the valuation of the stock was limited to a much smaller amount than its true value. The shipper objected to this valuation, but was told by the clerk that it was merely a form; and the shipper then executed the contract. There was no evidence showing that the clerk had authority to vary the contract, and the contract expressly stated that he had none. It was held that an instruction that the shipper was bound by the limitation of liability in the contract was proper, since the fact that he was obliged to sign the contract in order to obtain the reduced rate did not establish duress, and the remarks of the clerk at the time of the execution of the contract did not constitute fraud in procuring the contract.

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B. STRICTLY CONSTRUED AGAINST CARRIER.

And such a contract must be construed most strongly against the carrier, and in favor of the shipper, in every doubtful case.

United States.—*Menzell v. Chicago, etc., Ry. Co. (C. C.)*, Fed. Cas. No. 9, 429, 1 Dill. 531.

California.—*Hooper v. Wells Fargo & Co.*, 27 Cal. 11, 85 Am. Dec. 211.

Indiana.—*Adams Express Co. v. Carnahan*, 29 Ind. App. 606; *Rosenfeld v. Peoria, etc., R. Co.*, 103 Ind. 121, 21 Am. & Eng. R. Cas. 87, 2 N. E. 344; *St. Louis, etc., R. W. Co. v. Smuck*, 49 Ind. 302.

Missouri.—*Kellerman v. Kansas City, etc., R. Co.*, 68 Mo. App. 255; *Stanard Milling Co. v. White Line Cent. Transit Co.*, 122 Mo. 258, 26 S. W. 704.

New Hampshire.—*Barter v. Wheeler*, 49 N. H. 9.

New York.—*Edsall v. Camden, etc., R. Co.*, 50 N. Y. 661.

Wisconsin.—*Cream City R. Co. v. Chicago, etc., Ry. Co.*, 63 Wis. 93, 23 N. W. 425.

Limitation of the common-law liability of a common carrier, for its benefit, inserted in a receipt drawn up by it and signed by the carrier alone, for freight intrusted to its for carriage, are to be construed most strongly against the carrier. So held in *Hooper v. Wells Fargo & Co.*, 27 Cal. 11, 85 Am. Dec. 211.

Bill of lading exemptions of a carrier from its common-law liability, even when legal, are not favored, and should be strictly construed; and cases not in terms included by the exemption should be excluded from its operation. So held in *Deming v. Merchants' Cotton-Press etc., Co.*, 90 Tenn. 306, 17 S. W. 89.

A contract limiting the liability of a common carrier is not to be construed liberally in its favor. So held in *Cream City R. Co. v. Chicago, etc., Ry. Co.*, 63 Wis. 93, 23 N. W. 425.

Ambiguous contracts, by which a common carrier seeks to avoid its common-law liability, should be construed most strongly against it. So held in *St. Louis, etc., R. W. Co. v. Smuck*, 49 Ind. 302.

Plainly within Words of Contract.—Where a contract of shipment purports to limit the liability of a common carrier by a special agreement with the shipper, the carrier can claim nothing beyond what is plainly within the words of the contract. So held in *Richardson v. Chicago, etc., R. Co.*, 149 Mo. 311, 50 S. W. 782.

Construction of Contract—Implication.—In order that a shipping contract shall limit the carrier's liability, the language of the contract must fairly require it to be so construed without the aid of implication. So held in *Jennings v. Grand Trunk Ry.*, 127 N. Y. 438, 22 N. E. 394.

Where Words May Operate without Including Negligence.—In *Holsapple v. Rome, etc., R. Co.*, 86 N. Y. 275, 3 Am. & Eng. R. Cas. 487, it is held that however broad and general may be the language of a carrier's contract, if it does not specifically and in express terms

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release it from the consequences of its own negligence, and if the general words may operate without including such negligence, that construction will be given to them, and they will not so exempt the carrier.

"Taken at the Owner's Risk."—In a bill of lading, or receipt for freight, given by a railroad company, an exception in these words, "taken at the owner's risk," only exempts the company from the liability of an insurer which is by law imposed on a common carrier. So held in *Mobile, etc., R. Co. v. Jarboe*, 41 Ala. 644.

Inevitable Accident—Implied by Law.—The exception clause as to inevitable accident is implied by law in favor of common carriers where it is not expressed in the bill of lading. So held in *Morrison v. Davis*, 20 Pa. St. 171.

Actions Involving Construction of Contracts—Evidence and Findings—Rules for Measuring.—The evidence and findings in actions involving the construction of contracts limiting the liability of common carriers are not measured by any different rules than in cases to which carriers are not parties. So held in *Adams Express Co. v. Carnahan*, 29 Ind. App. 606.

"While at Depots Excepted"—Application—Depot at End of Route.—Where a bill of lading stipulated that the carrier would forward the freight with reasonable dispatch, "the damages incident to the railroad transportation, loss or damage by fire or the elements, while at depots excepted," it was held that this condition should be construed to mean that the carrier would be exempt from liability from the designated causes only at depots, where the cars containing the freight stop while in transit, and not at the depot at the end of the route. *Standard Milling Co. v. White Line Cent. Transit Co.*, 122 Mo. 258, 26 S. W. 704.

"Awaiting Delivery"—Goods in Depots Awaiting Transportation.—In *Michigan Cent. R. Co. v. Mineral Springs Mfg. Co.*, 16 Wall. (U. S.), 318, 329, 21 L. Ed. 297, it is held that the charter of the plaintiff railroad company providing that the company shall not be responsible for goods on deposit in any of their depots "awaiting delivery," does not include goods in such depots awaiting transportation, but refers to such goods alone as have reached their final destination.

Delivery to Steamships—Placing Lumber on Railroad's Pier.—In *Lewis v. Chesapeake & O. Ry. Co.*, 47 W. Va., 656, 35 S. E. 908, 81 Am. St. Rep. 816, it appeared that defendant railroad received for shipment to Liverpool two car loads of lumber, and issued its bill of lading, containing, among others, this clause: "(12) This contract is executed and accomplished, and all liability thereunder terminates, on the delivery of the said property to the steamships, * * * or on the steamship pier at the said port of Newport News.)" It was held that the placing of the lumber on the pier of the railroad at such port, under its own exclusive control, was not sufficient to relieve it of its liability as a common carrier for damages for the loss of the lumber.

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"Ready for Delivery to the Next Carrier."—When the language of a shipping contract is ambiguous every presumption is in favor of the shipper; and a condition upon the back of a shipping receipt containing the words "ready for delivery to the next carrier" should be given a construction consistent with the agreement on the face of the contract; and one fairly susceptible of the construction that the carrier's liability is to continue until the goods are either actually or constructively in the possession of the other carrier. So held in *American Roofing Co. v. Memphis, etc., Packet Co.*, 8 Ohio Dec. 490.

Gross or Wanton Negligence Excepted—Negligence in Selecting Route—Notice of Danger from Cold.—A contract of shipment by which the shipper insures the carrier railroad against claims for loss or damage which may be incurred by reason of delay in transportation, or any other cause arising out of its responsibility as master over its agents (gross or wanton negligence excepted), incident to such shipment does not relieve the railroad from liability for the destruction of the trees by reason of its conduct in unreasonably ordering them to be transported over a route upon which the railroad was chargeable with notice of the danger of their destruction by cold. So held in *Pierce v. Southern Pac. Co.*, 120 Cal. 156, 157, 10 Am. & Eng. R. Cas., N. S., 88, 47 Pac. 874, 52 Pac. 302.

Fire Clause—Express Company's Liability for Railroad's Negligence.—An exception in its bill of lading, "that the express company is not to be liable in any manner or to any extent for any loss or damage or detention of such package, or its contents, or any portion thereof occasioned by fire," does not excuse the express company from liability for the loss of such freight by fire, if it was caused by the negligence of a railroad company to which the express company had intrusted a part of the duty it had assumed. So held in *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174.

Limiting Liability to Own Line—Passenger Ticket—Application of Clause—Baggage.—In *Coward v. East Tenn. & Va. & Ga. R. Co.*, 84 Tenn. 225, 57 Am. Rep. 226, it appeared that plaintiff purchased a through ticket over several connecting lines of railroads and signed a contract attached, in which were the following terms: "In selling this ticket this company acts as agent and is not responsible beyond its own line." It was held that such stipulation had reference to personal injuries alone, and that the initial carrier was liable for the loss of baggage in case of a through ticket, even though it occurred on one of such connecting lines.

Through Bill of Lading Issued by Traffic Association—Limiting Liability to Own Line.—In *Southard v. Minneapolis, etc., Ry. Co.*, 60 Minn. 382, 62 N. W. 442, it appeared that a traffic association, composed of several carriers, issued a through bill of lading for freight from Minneapolis, Minn., to Boston, Mass., containing a stipulation that in case of loss, detriment, or damage to the freight, whereby liability should be incurred, the carrier alone should be liable in whose

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actual custody it should be at the time of the loss. It was held that, under the terms of the bill of lading, the shipper was entitled to an uninterrupted continuous carrier's duty from Minneapolis to Boston; and that the clause in question made the carrier who had transported the freight to a point where another was to assume custody and control a guarantor or surety that the latter would receive, and also made it liable as an actual custodian, notwithstanding the flour had been offered to such connecting carrier, and it had unreasonably neglected or refused to receive it.

Application of Fire Clause—"Places of Transshipment"—Cotton in Warehouse of Compress Company.—Common carriers are not exempted from liability for loss of cotton by fire, caused without their negligence, after its delivery to the carrier, and while it remained in the warehouse of a compress company for compression for shipment, although their respective bills of lading contained valid fire-clauses, providing for exemption from liability for loss by fire, in general terms, or "while in depots or places of transshipments," or "while at depots or stations," or "while in transit or at stations," a warehouse of a compress company not being included in any of such clauses. So held in *Deming v. Merchants' Cotton-Press, etc., Co.*, 90 Tenn. 306, 17 S. W. 89.

Carriage by Water—Application of Fire Clause—Fire on Railroads.—Where common carriers by water, in their bill of lading made at Toledo, Ohio, stipulated to deliver goods to consignees at Concord, N. H., the damages of navigation, fire, and collisions on the lakes and rivers and the Welland Canal excepted, it was held that this limitation did not extend to losses by fire on the railroads. So held in *Barter v. Wheeler*, 49 N. H. 9.

Bill of Lading Partly Printed and Partly Written—"Without Transfer"—Fire Clause—Fire Resulting from Breach of Condition.—Where a contract of affreightment is contained in a bill of lading which is partly printed and partly written, the contract is to be gathered from the whole instrument, and a condition therein that the carrier will transport the freight "without transfer, in cars owned and controlled by the company" constitutes a part thereof, a breach of which, occasioning a loss of the goods by fire, does not entitle the carrier to the protection of another stipulation of the bill of lading, that the carrier will not be responsible for such a loss. So held in *Robinson v. Merchants' Despatch Trans. Co.*, 45 Iowa 470.

Carriage of Live Stock—Fire Caused by Burning of Feed—Negligence of Carrier—Application of Exemption.—In *Holsapple v. Rome, etc., R. Co.*, 86 N. Y. 275, 3 Am. & Eng. R. Cas. 487, it appeared that a contract with two railroad companies for the transportation of sheep, by its terms, in consideration of a reduction of the charges for freight, released them from liability for injuries to the animals "caused by burning of hay, straw, or other material used for feeding said animals, or otherwise." The contract contained no words ex-

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pressly exempting the carriers from liability for their own negligence. A fire occurred in the cars which destroyed a number of the sheep, the loss resulting from the negligence of one of the railroad companies, in omitting to supply the train with such appliances as would have enabled those in charge to have stopped it and extinguished the fire before serious damage had resulted. It was held that the exemption did not include negligence, and that defendant was liable.

Limiting Value—Recovery of Amount for Each Case in Package.—Where the freight receipt of a common carrier contained a clause limiting his liability to \$50 for "the article" forwarded, and the receipt was for "one package (3 cases Drugs)," it was held that the shipper could recover \$50 for each case lost. So held in *Wetzell v. Dinsmore*, 4 Daly (N. Y.), 193.

Limiting Value of Articles—Recovery of Aggregate Value.—In *Earle v. Cadmus*, 2 Daly (N. Y.) 237, it appeared that a condition contained in a common carrier's receipt of a trunk provided that he would not be liable for "an amount exceeding \$50 upon any article." It was held that the condition referred to the separate articles contained in the trunk, and their separate value not exceeding that sum, and, therefore, a recovery might be had for their aggregate value, although the amount exceeds \$50.

Liability for Packages Exceeding \$100 in Value Not Excluded.—In *Calderon v. Atlas Steamship Co.* (C. C. A.), 69 Fed. Rep. 574, it appeared that the bill of lading under which certain freight was shipped contained a stipulation that the carrier should not be liable "for goods of any description which are above the value of \$100 per package, unless bills of lading are signed therefor with the value therein expressed, and a special agreement is made." It was held that this should be construed, not as excluding any liability for packages exceeding \$100 in value, but as excluding liability for the excess over \$100; and that the stipulation was valid.

Limiting Value—Invoice Price—Failure to State.—Where there is a special contract making the invoice price of trees at the point of shipment the measure of damages, and no invoice price was actually made out and agreed upon, that expression must be understood as indicating the actual value of the trees at the point of shipment when loaded and ready for transportation. To this is to be added the freight actually paid and interest on the whole amount. So held in *Pierce v. Southern Pac. Co.*, 120 Cal. 156, 157, 47 Pac. 874, 52 Pac. 302, 10 Am. & Eng. R. Cas., N. S., 88.

Notice of Claim—Application of Condition—Damage from Change in Cattle Market.—In *Leonard v. Chicago & A. Ry. Co.*, 54 Mo. App. 293, 294, it is held that a condition of a shipping contract that the shipper shall give notice of his damages within five days after the train's arrival at its destination, relates to damage to the cattle themselves and not to damage suffered by a change in the market; nor does a provision purporting to relieve the carrier from liability for

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loss or damage after delivering upon stock yards tract refer to loss by fall in market.

Baggage Put on Another Vessel—Bill of Lading Given by Its Mate.—"Personal Goods."—In *The Elvira Harbeck* (C. C.), Fed. Cas. No. 4,424, it appeared that a person took passage in a vessel, but his personal baggage did not reach him in time to be put on board of the vessel, and he sailed without it, and it was put on board of another vessel, and a receipt or bill of lading was given for it by the mate of the latter vessel; but the baggage was never delivered at its port of destination. It was held that the case was one of the ordinary shipment of goods on freight; and that the words "personal goods" on the margin of such receipt or bill of lading, were at most but a description of the character of the goods, and did not exempt their owner from freight, or the vessel from responsibility.

"Breaking" and "Chafing"—Live Stock.—In *Coupland v. Housatonic R. Co.*, 61 Conn. 531, 23 Atl. 870, 55 Am. & Eng. R. Cas. 380, it is held that "breaking" and "chafing," as used in a clause of a bill of lading purporting to limit the carrier's liability, was not intended to apply to live stock, and the breaking of a mare's leg was not covered by them.

Word "Horse" Does Not Include "Jack"—Limiting Value.—In *Richardson v. Chicago, etc., R. Co.*, 149 Mo. 311, 50 S. W. 782, it appeared that the shipper's printed contract with defendant railroad company, which had undertaken to transport his jack from one town to another, provided that the railroad would not be liable in case of loss or injury in excess of \$100 for each "horse or mule," but said nothing about its liability in case the animal was a "jack," although the contract stated that the animal shipped was a "jack." It was held that the word "horse" used in the contract could not be taken in a generic sense and made to include the jack, and therefore the limited value clause of the contract did not apply, so as to prevent the recovery of the actual damage, which the jury found to be \$1,000.

C. MUST BE LEGIBLE.

Unless the shipper's attention is expressly called to a condition in a shipping contract purporting to limit the carrier's liability, and it is clearly explained to him, it will not bind him unless it is legible, and calculated to attract the attention of a person of ordinary intelligence and prudence in respect to such matters.

Local Carrier's Receipt for Baggage Check—Car Dimly Lighted—Smaller Type.—Thus in *Blossom v. Dodd*, 43 N. Y. 264, 3 Am. Rep. 701, it appeared that a railroad passenger, in a car dimly lighted at one end, delivered his baggage check to an express messenger and received in return a card or receipt on which the number of the check was entered, and which also contained an agreement limiting the liability of the express company, printed in much smaller type than the rest of the card, and so fine as to be illegible where the pas-

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senger was sitting. It was held that such printed matter did not enter into or form a contract between the parties.

Provision of Bill of Lading Obscured by Stamps.—In a bill of lading, providing for the carrying of the goods beyond the line of the carrier issuing the bill, a provision in fine print, somewhat obscured by the use of stamps, that in case of injury to the goods only the carrier having custody of the goods at the time of the injury shall be liable, cannot be regarded as part of the contract. *Allen & Gilbert-Ramaker Co. v. Canadian Pac. Ry. Co.* (Wash.), 24 R. R. R. 75, 47 Am. & Eng. R. Cas., N. S., 75, 84 Pac. 620.

Printed Clause Obscured by Stamp—Receipt Given to Shipper's Servant—Acceptance of Similar Contracts.—In *Perry v. Thompson*, 98 Mass. 249, an action against a carrier for the value of goods lost in his custody, it was held that evidence that often, but not invariably, he had given to plaintiff receipts containing a printed clause limiting his liability for goods transported by him, and that, on the occasion in question, after receiving the goods, he gave to a servant of plaintiff a receipt for them, containing such a printed clause, but that over a part of this clause in this receipt a stamp was so pasted as to render it unintelligible, and that until after the loss neither the plaintiff nor any of his agents or servants had actual knowledge of such a clause in this or any of the other receipts, is not sufficient to warrant a finding that the plaintiff assented to any limitation of the defendant's liability.

Special Agreement in Writing—Duty to Explain—Burden of Proof.—If an alleged special agreement between a carrier and shipper, limiting the liability of the carrier for loss of or injury to the goods, is in writing, it must be expressed in such manner as to be understood by a person of ordinary intelligence, and if not so expressed, it must have been shown to have been explained to the shipper, so as to enable him to understand it. So held in *Carpenter v. Baltimore & O. R. Co.* (Del. Sup'r Ct.), 20 R. R. R. 679, 43 Am. & Eng. R. Cas., N. S., 679, 64 Atl. 252.

Baggage—Limiting Value—Receipt in Foreign Languages Handed to Emigrant.—In *Engberman v. North German Lloyd S. S. Co.* (N. Y. Sup. Ct.), 84 N. Y. Supp. 201, it appeared that an emigrant standing in line with about 40 other passengers, all of them about to sail on a steamship, was handed by the agent of the carrier a receipt for her baggage bearing conditions in languages she did not understand. It was held that a provision in such receipt limiting the liability of the carrier to \$25 unless the value of the baggage in excess thereof be declared on the issue of the receipt or before delivery of baggage is not binding on the passenger.

Waybill Signed by Shipper—Obscure Stipulations—Question for Jury.—In *Sayles v. New York, etc., R. Co.* (C. C.), 81 Fed. Rep. 326, an action to recover for the loss of freight, it appeared that a waybill, signed by the shipper, contained stipulations purporting to limit

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the carrier's liability, which were not very plain, and not so situated as to be plainly included within the terms of the contract. It was held that it was for the jury to determine whether the shipper understood, or should have understood, that there were such restrictions of the carrier's liability.

D. FREEDOM OF CHOICE.

A common carrier cannot, by a stipulation in its bill of lading or freight receipt, limit its common-law liability unless it gives the shipper, at the time of making the contract of shipment, the opportunity to elect, upon just and reasonable terms, between the limited and full liability of the carrier. *Atchison, etc., R. Co. v. Dill*, 48 Kan. 210, 29 Pac. 148, 55 Am. & Eng. R. Cas. 375; *McMillan v. Michigan, etc., R. Co.*, 16 Mich. 79, 93 Am. Dec. 208; *Railroad v. Craig*, 102 Tenn. 298, 52 S. W. 164; *Missouri Pac. R. Co. v. Fagin*, 72 Tex. 127, 9 S. W. 749.

Implied Contract.—Common carriers are bound to carry articles within the scope of their business without any other contract than such as the law would imply. So held in *Adams Express Co. v. Nock*, 63 Ky. (2 Duv.) 562, 87 Am. Dec. 510.

A common carrier cannot limit its common-law liability by a special written contract with the shipper, unless it is freely and fairly made. So held in *Atchison, etc., R. Co. v. Dill*, 48 Kan. 210, 29 Pac. 148, 55 Am. & Eng. R. Cas. 375.

Waiver of Rights Cannot Be Demanded of Shipper.—A railroad company, as a common carrier, has no right to demand of the shipper a waiver of his rights as a condition precedent to receiving freight for transportation. So held in *Missouri Pac. R. Co. v. Fagin*, 72 Tex. 127, 9 S. W. 749.

Effect of Shipper's Haste in Signing Contract.—But a shipper, even not, in the absence of fraud by a carrier, avoid limitations imposed by a special contract, by showing that he executed it hurriedly, or without due care, or that he was ignorant of its contents. *Evansville, etc., R. Co. v. Kevekordes* (Ind. App.), 69 N. E. 1022; *Stewart v. Cleveland, etc., R. Co.*, 21 Ind. App. 218, 52 N. E. 89; *Hengstler v. Flint, etc., R. Co.*, 125 Mich. 530; *Nashville, etc., R. Co. v. Stone*, 112 Tenn. 348, 367, 79 S. W. 1031; *Ft. Worth, etc., R. Co. v. Wright*, 24 Tex. Civ. App. 291, 58 S. W. 846; *San Antonio, etc., Pass. R. Co. v. Wright*, 20 Tex. Civ. App. 136, 49 S. W. 147.

Signed in Haste without Reading—Absence of Parol Contract.—A shipper will not be allowed to repudiate a shipping contract, purporting to restrict the carrier's liability merely on the ground that he signed it in haste and without reading, where he delivered the freight to the carrier without any special parol contract. So held in *Hengstler v. Flint, etc., R. Co.*, 125 Mich. 530.

Contract Not Ready for Signature until Time to Take Train.—Where there was no fraud or misrepresentation by the carrier or its

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agent, the shipper could not repudiate the terms of a written contract purporting to limit the carrier's liability, which was signed by him without reading because it was not ready for his signature until the time arrived for him to take the train to accompany the shipment. So held in *Johnstone v. Richmond, etc., R. Co.*, 39 S. Car. 55, 17 S. E. 512, 55 Am. & Eng. R. Cas. 346. In this case it is said in the opinion: "As was said by Mr. Justice McGowan in *Bethea v. Railroad Company*, 26 S. C., at page 96: 'It would tend to disturb the force of all such contracts, if one, in possession of ordinary capacity and intelligence, were allowed to sign a contract and act under it, in the employment of all its advantages, and then to repudiate it upon the ground that its terms were not brought to his attention. In the absence of all fraud, misrepresentation or mistake, it must be presumed that he read the contract and assented to its conditions.'"

Prior Verbal Understanding—Contract Signed after Cattle Were Loaded—No Opportunity to Examine.—In *St. Louis, etc., Ry. Co. v. Cleary*, 77 Mo. 634, 46 Am. Rep. 13, 16 Am. & Eng. R. Cas. 122, it was held that a written contract purporting to limit the common-carrier liability of a railroad company, in the transportation of cattle, was, in the absence of fraud or mistake, the sole evidence of the final agreement of the parties, and binding upon the shipper, although signed by him after the cattle were loaded into the cars, with a prior verbal understanding as to the terms of the shipment, and presented to him for signature when there was no sufficient time for its examination before the departure of the train.

E. TIME OF MAKING CONTRACT.

In order that such a shipping contract may bind the shipper, it must have been made before or at the time of the shipment of the goods.

Alabama.—*Louisville & N. R. Co. v. Meyer*, 78 Ala. 597, 27 Am. & Eng. R. Cas. 44.

Georgia.—*Central Railroad v. The Dwight Mfg. Co.*, 75 Ga. 609.

Illinois.—*American Express Co. v. Spellman*, 90 Ill. 455; *Merchants' Despatch Transp. Co. v. Fruthman*, 149 Ill. 66, 36 N. E. 624; *Michigan, Cent. R. Co. v. Boyd*, 91 Ill. 269; *Wabash R. Co. v. Lannum*, 71 Ill. App. 84.

Indiana.—*Cleveland, etc., R. Co. v. Potts & Co.*, 33 Ind. App. 564.

Iowa.—*German v. Chicago, etc., R. Co.*, 38 Iowa 127.

Massachusetts.—*Perry v. Thompson*, 98 Mass. 249.

Minnesota.—*Southard v. Minneapolis, etc., Ry. Co.*, 60 Minn. 382, 62 N. W. 442.

Nebraska.—*Union Pac. R. Co. v. Marston*, 30 Neb. 241, 46 N. W. 485.

New York.—*Germania F. Ins. Co. v. Memphis, etc., R. Co.*, 72 N. Y. 90, 28 Am. Rep. 115; *Lamb v. Camden, etc., T. Co.*, 2 Daly (N. Y.), 454; *Ryer v. Pennsylvania R. Co.*, 25 Misc. (N. Y.) 715; *Swift*

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v. Pacific Mail Steamship Co., 106 N. Y. 206, 12 N. E. 583, 30 Am. & Eng. R. Cas. 105.

Ohio.—*Gaines v. Union Transp., etc., Co.*, 28 Ohio St. 418; *Welsh v. Pittsburg, etc., R. Co.*, 10 Ohio St. 65.

Texas.—*Galveston, etc., R. Co. v. Botts*, 22 Tex. Civ. App. 609; *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677; *Missouri, etc., Co. v. Withers*, 16 Tex. Civ. App. 506.

Shipped under Parol Contract—Failure of Shipper to Point Out Errors in Bill of Lading.—Where freight has been actually shipped under a parol contract, the subsequent receipt by the shipper of a bill of lading and his neglect to point out errors therein does not preclude him from showing the oral contract. So held in *Guillaume v. General Transp. Co.*, 100 N. Y. 491, 3 N. E. 489.

Bill of Lading Issued after Shipment.—The common-law liability of a carrier is not affected by the issuing and delivery to the shipper of a bill of lading, purporting to limit the carrier's liability, after the commencement of the transportation. So held in *Railroad v. Craig*, 102 Tenn. 298, 52 S. W. 164.

Mere Receipt of Bill of Lading after Verbal Agreement Has Been Acted upon.—In *Bostwick v. Baltimore & O. R. Co.*, 45 N. Y. 712, it is held that where freight is shipped under a verbal agreement for its transportation, such agreement is not merged in a bill of lading, partly written and partly printed, delivered to the shipper after he has parted with control of his goods, although such bill of lading by its terms purported to limit the liability of the carrier and expressed on its face, that by accepting it, the shipper agreed to its conditions. The mere receipt of the bill, after the verbal agreement has been acted on, and the shipper's omitting, through inadvertence, to examine the printed conditions, are not sufficient to conclude him from showing what the actual agreement was, under which the goods had been shipped.

Prior Contract—Bill of Lading Accepted after Freight Has Been Shipped.—In *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.* (C. C. A.), 120 Fed. Rep. 873, it is held that the mere acceptance of a bill of lading does not affect or alter a prior contract, under which the freight has been actually shipped, and is in course of transit, unless the shipper actually consents to the change.

After Reception of Property by Carrier.—In *Gulf, etc., Ry. Co. v. Wood* (Tex. Civ. App.), 30 S. W. 715, it is held that after a common carrier has received property for transportation, a contract limiting its common-law liability is illegal.

Baggage—Endorsement on Ticket—Notice before Starting of Cars Essential.—To limit a railroad company's common-carrier liability for loss of its passenger's baggage, it must be shown that the passenger had actual notice of such limitation before the cars started; and an endorsement on the ticket given to the passenger is not enough, unless it is shown that he was aware of its purport before his train

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started for his destination. So held in *Wilson v. Chesapeake & Ohio R. Co.*, 21 Gratt. (Va.) 654.

Bill of Lading Not Received by Shipper Contemporaneously with Delivery of Goods to Carrier.—Where a shipper of goods over the lines of connecting carriers does not receive a bill of lading from the initial carrier limiting its common-law liability contemporaneously with the delivery of the goods to such carrier, the carrier assumes a common-law liability. *Southern Ry. Co. v. Levy* (Ala.), 17 R. R. R. 50, 40 Am. & Eng. R. Cas., N. S., 50, 39 So. 95.

Express Receipt Given to Shipper after Delivery of Package to Carrier—Notice—Absence of Presumption.—Where no receipt is given at the time a package is delivered to an express company for carriage, the company cannot restrict its liability by a receipt subsequently given, where the proof negatives all presumption of any knowledge on the part of the shipper that the receipt contained a clause purporting to limit the carrier's liability, or that the carrier claimed any such limitation. So held in *American Express Co. v. Spellman*, 90 Ill. 455.

Limiting Liability to Own Line—Bill of Lading Sent to Shipper after Delivery of Freight to Railroad.—In *Central Railroad v. The Dwight Mfg. Co.*, 75 Ga. 609, it appeared that a shipper contracted with a railroad company to ship two hundred bales of cotton from Atlanta, Ga., to Chicopee, Mass., over a certain route, at a stated price; and delivered the cotton to the railroad, and afterwards a bill of lading was sent to the shipper. It was held that liability of the railroad company was that of a common carrier to transport the cotton from the initial point to its destination; and it could not limit its liability by inserting in the bill of lading a provision that, for all loss or damage occurring in the transit, the legal remedy should be sought and held only against the particular carrier in whose custody the cotton might be at the time thereof; there being no express contract to that effect, the bill of lading being signed only by the agent of the company, and not having been agreed to by the shipper.

Receipt Given to Shipper's Drayman after Receipt of Package.—In *Seller v. Steamship Pacific*, 1 Ore. 409, it is held that where the drayman of the shipper, on the delivery of a package, takes a receipt from the freight clerk of the ship, containing the words, "not accountable for contents," this, of itself, does not constitute such an agreement, it being a mere ex parte proposition on the part of the carrier, after the receipt of the package, and, to exempt the carrier, there must be direct or unequivocal evidence of the assent of the shipper.

Contract Not Signed until Four Cars Had Been Shipped without Notice to Owner—Nudum Pactum.—Where a shipping contract, stipulating that the owner was to assume all risk of injury done by the cattle to each other and also that the owner should be permitted to pass on the train to take charge of them, was not signed until four

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of the cars had been shipped without notice to him, the contract was nudum pactum, so far as such four cars were concerned and did not relieve the carrier from the necessity of exercising ordinary care for the safety of their contents. So held in *German v. Chicago*, etc., R. Co., 38 Iowa 127.

Cars Loaded under Verbal Contract—Folded Receipt Accepted without Knowledge of Contents.—Where there is a verbal shipping contract, under which the shipper accepts and loads the car, it cannot be varied or modified, so as to restrict the carrier's liability, by a receipt for the goods which the carrier's agent thereafter delivers to the shipper folded up and which the shipper, without knowledge of its contents, puts in his pocket. So held in *Stoner v. Chicago G. W. Ry. Co.*, 109 Iowa 551.

Contract Signed after Train Had Started with Cattle—Coercion and Impatience of Trainmen—Fraud.—In *Atchison*, etc., Ry. Co. *v. Grant*, 6 Tex. Civ. App. Rep. 674, 26 S. W. 286, it appeared that in a shipment of stock no written contract was entered into between the shipper and the carrier until after the stock had been started toward their destination, and that subsequently the shipper and his men were called into the depot at a way station, late at night, and there told to hurriedly sign for transportation; and he was compelled to sign papers which he did not have time to read, owing to the coercion and impatience of the trainmen. It was held that such conduct constituted fraud in securing the signature of the shipper to a written contract of shipment.

Prior Verbal Agreement—Contracts Presented for Signature after Loading—Agent's Misrepresentations.—In *Southern Pac. R. Co. v. Anderson*, 26 Tex. Civ. App. 518, 63 S. W. 1023, it appeared that plaintiff verbally agreed with a railroad for the transportation of stock, and subsequently, when the stock had been loaded, the railroad's agent presented several contracts to plaintiff for his signature, stating they were vouchers to be shown to conductors, and plaintiff signed them without examination, having no opportunity to do so. It was held that the terms of the verbal contract was exclusively controlling.

Same—Same—Free Pass.—In *Texas & Pac. Ry. Co. v. Avery*, 19 Tex. Civ. App. Rep. 235, 46 S. W. 897, it is held that a railroad company cannot claim that a written shipping contract, demanded of the shipper after loading his cattle on its cars under an oral contract, is binding on the shipper because there was included as part of such contract a free pass over the road with the cattle, where the shipper was required by contract, in consideration of such free pass, to have charge of loading, unloading, and otherwise discharging certain duties of the carrier.

Baggage—Notice on Ticket Not Discovered until after Commencement of Journey.—If the passenger's attention is called to a notice printed upon the face of his ticket purporting to restrict the railroad's liability with respect to the passenger's baggage or if he knew

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of it when he purchased the ticket, the law will presume, in the absence of any objection on his part, that he assented to the terms expressed by the ticket. But the contract is made, and the rights and duties of the parties are determined, when the ticket is purchased, and a discovery by the passenger of such notice after he has entered upon his journey does not affect his rights. So held in *Rawson v. Pennsylvania R. Co.*, 48 N. Y. 212, 8 Am. Rep. 543.

Provision Stamped upon Face of Contract after Delivery to Carrier—Assent of Shipper.—In order to relieve a common carrier from its common-law liability and from liability according to the terms of the contract offered by plaintiff, by virtue of a provision stamped upon the face of the contract after the goods have been received by the carrier, and the contract of shipment signed by its agent, it is necessary that it should appear that the shipper assented to such provision. So held in *American Roofing Co. v. Memphis, etc., Packet Co.*, 8 Ohio Dec. 490.

Shipped under Prior Verbal Agreement—Bill of Lading Received without Examination and Sent to and Used by Consignee.—Where the plaintiff's evidence tended to show that the goods were shipped under a previous verbal agreement without special exemptions in favor of the carrier, and that, after the goods were in transit, the bill of lading containing such exemptions was handed to the shipper, who, without examination or objection, forwarded it to the consignee, who made use of it to receive and sell the goods not lost, and accounted to the shipper for the proceeds, it was error to charge the jury that such acts of the consignee and consignor were conclusive on the latter, and bound him by the conditions contained in the bill of lading, where it appeared that he had no knowledge of such conditions, and never in fact assented to them. So held in *Gaines v. Union Transp., etc., Co.*, 28 Ohio St. 418.

Limiting Liability to Own Line—Bill of Lading Mailed to Consignor after Shipment of Goods.—If the consignor, contemporaneously with the delivery of the goods to the carrier, receives a bill of lading limiting the liability of the carrier to losses accruing on his own route, "possibly he would be conclusively presumed to have read it, and to have acquiesced in it;" but this principle does not apply, where it is shown that the carrier, receiving the freight for the entire route, made out a bill of lading, which, being incomplete as to the amount of the charges, was not delivered to the consignor at the time, but was subsequently forwarded to him by mail at the place of destination. So held in *Louisville & N. R. Co. v. Meyer*, 78 Ala. 597, 27 Am. & Eng. R. Cas. 44.

Bill of Lading Delivered Several Days after Shipment—Failure to Object—Waiver of Oral Contract.—A failure to object to restrictions of the carrier's liability contained in a bill of lading, delivered several days after the freight had been shipped, cannot, in view of the doctrine prevailing in New York, be held to be a waiver of an oral con-

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tract of shipment wherein different terms were agreed upon. So held in *Merchants' Dispatch Transp. Co. v. Furthmann*, 47 Ill. App. 561.

Contract Signed by Shipper While En Route to Secure Rights Guaranteed by Original Contract.—In *Wabash R. Co. v. Lannum*, 71 Ill. App. 84, it appeared that appellee ordered and the railroad company furnished cars for the shipment of stock, under a contract signed by the agent of the company, and the stock was received and shipped by the company under such contract, but another contract was presented to the shipper while he was en route with the stock, with a request that he sign it, which he did in order to secure a right guaranteed by the original contract, but under protest, making it clear that he did not assent to its terms. It was held that the original contract must control and that the second was not binding on the shipper.

Special Agreement for Through Shipment—Subsequent Bill of Lading—Receipt without Objection, and Hypothecation—Conditions in Small Type—Acceptance by Clerk without Authority.—In *Northern Pac. Ry. Co. v. American Trading Co. (U. S.)*, 15 R. R. R. 744, 38 Am. & Eng. R. Cas., N. S., 744, 25 Sup. Ct. Rep. 84, it is held that a special agreement in behalf of railway receivers to forward a through shipment by the steamer of a connecting carrier sailing on a designated day is not modified by the mere receipt, without objection, and the subsequent hypothecation, of the bill of lading containing, as a part of numerous conditions printed in small type, the statements that the carrier is not to be liable for any loss not occurring on its own road, and that the contract as executed is accomplished, and all liability thereunder terminates, upon the delivery of the property to the vessel, where the bill of lading was not examined or read, and was accepted after the goods had passed from the control of the shipper, by a clerk who had no knowledge of these conditions, and no authority to consent to a modification of the contract already made.

Shipped under Prior Contract—Negotiation of Bill of Lading.—The fact that a shipper, after receiving a bill of lading, negotiates it, is not a ratification or adoption of its terms, as between him and the carrier, which will operate to annul or modify a prior valid contract under which the freight was shipped, and under which rights have vested and obligations accrued. So held in *Farmers' Loan & Trust Co. v. Northern Pac. R. Co. (C. C. A.)*, 120 Fed. Rep. 873.

Paper Handed to Shipper Several Hours after Shipment—Misleading Conduct of Carrier's Agent.—In *Union Pac. R. Co. v. Marston*, 30 Neb. 241, 46 N. W. 485, it appeared that M. applied to an agent of the Rock Island & Peoria R. Co., at one of its stations in the state of Illinois to ship certain office furniture, including a stove, to Kearney on the line of the Union P. R. Co. in Nebraska. The agent informed M. that the custom was for shippers to release stoves, but advised him not to do it for certain reasons, but to pay the addi-

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tional expense of sending it at carrier's risk. To this M. assented, and offered to pay the freight to such agent, who informed him that he could as well pay it at the end of the route. Four or five hours after the agent had shipped the goods, he handed M. a paper, saying that it was a receipt for the goods shipped. This paper M. put in his pocket without examining it, and which proved to be a bill of lading of the goods, containing, inter alia, the condition, "stoves at owner's risk of breakage." It was held that, as between M. and the Rock Island & Peoria R. Co., the stove was carried at carrier's risk.

Bill of Lading Issued after Destruction of Consignment.—In *Wilde v. Merchants' Despatch Transp. Co.*, 47 Iowa 272, it appeared that defendant received from plaintiff's consignor at New York a package marked "Iowa City," giving at the time a shipping receipt entitling the consignor to a bill of lading. Some days after it issued the bill of lading, purporting to carry the package to Chicago only, knowing that the consignment had been destroyed in transitu at Chicago. It was held that the carrier was liable at common law, notwithstanding a restriction in the bill of lading.

A railroad company cannot escape from its liability as a common carrier by issuing a bill of lading in the form of a track or warehouse receipt after the destruction of the consignment. So held in *Cleveland, etc., R. Co. v. Wilson*, 99 Ill. App. 367.

Portion of Freight Lost before Shipment of Balance or Signing of Contract.—In *Detroit, etc., Co. v. Adams*, 15 Mich. 458, it appeared that a portion of a certain quantity of freight was delivered to the appellant railroad by the owner, and received by their agent for transportation, with understanding that the balance should be sent to their depot as soon as they should give notice that they had cars for its transportation. The company having notified the owner, the balance of the freight was delivered to and accepted by it, and the owner then signed a shipping request furnished to him, to the effect that said company would forward all of such freight, according to certain special conditions endorsed thereon, and purporting to limit the carrier's liability. Suit being brought for the value of a portion of the freight, which was lost before the balance was shipped, it was held that the notice came too late to affect the question of a prior delivery to and acceptance by the railroad as a common carrier, and that at the time of the receipt of the notice, plaintiff had a right to consider it as intended to refer only to the liability of the company in respect to the carriage of the property.

Receipt Given after Loss of Goods—Shipper Carrier's Former Freight Agent.—A stipulation purporting to limit the liability of common carriers, contained in a receipt for goods given by them to the shipper on his request, after the goods were lost, does not affect the shipper's rights; nor are they affected by the fact that he had been recently their freight agent, and the receipts given by him as such agent contained the same stipulation. So held in *Gott v. Dinsmore*, 111 Mass. 45.

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Bill of Lading Mailed after Loss of Vessel—Prior Contract Acted upon—Letter and Delivery Order.—In *Park v. Preston*, 108 N. Y. 434, 15 N. E. 705, it appeared that plaintiffs, having been informed by defendant carriers that they would transport a quantity of iron at a price agreed upon, inclosed to them a delivery order for the iron, with a letter stating that they were to ship the iron to plaintiffs at "Pittsburgh, Pa., per canal to Buffalo and thence per rail A. V. R. R. Co., at \$3 per gross ton including insurance and all charges;" that defendants by means of the delivery order procured the iron and shipped it upon a canal boat, and on completion of the shipment signed a bill of lading which was mailed to plaintiffs, but before it reached them and on the day the bill of lading was signed the canal boat, with the iron on board, had sunk in the Hudson river. The bill of lading contained a provision purporting to exempt the defendants from liability for loss occasioned by "dangers or accidents of navigation while on lakes, rivers or canals." There was no evidence that the parties agreed, before the bill of lading was signed, that the goods were to be carried under a limited liability, or that the freight charges were regulated on that assumption, or that there was any usage or custom that bills of lading on shipments of this kind should contain such exemptions. Defendants offered to prove that the boat was sunk by reason of a peril within the exemption, which was rejected. It was held that such evidence was properly rejected; that defendants having acted upon the letter and acquired possession of the goods by means of the delivery order, there was apparently a complete contract; and while it might be assumed that in accordance with the usual course of business a bill of lading would be signed when the iron was shipped, this did not justify an inference that it was open to defendants to insert therein clauses restricting the common-law liability of the carriers.

Verbal Agreement to Ship on Certain Day—Liability Incurred—Subsequent Written Contract.—In an action against a railroad company for breach of a verbal agreement to receive and ship freight on a certain day, a subsequent written contract between the same parties, for the transportation of the same freight, which does not contain any release of defendant's liability already incurred or waive any right of plaintiff already accrued, is not admissible in evidence to show a merger of such verbal agreement. So held in *Harrison v. Missouri Pac. Ry. Co.*, 74 Mo. 364, 41 Am. Rep. 318, 7 Am. & Eng. R. Cas. 382; *Haskins v. Missouri Pac. Ry. Co.*, 19 Mo. App. 315.

In *McCullough v. Wabash W. Ry. Co.*, 34 Mo. App. 23, it appeared that a verbal contract was made with defendant to ship plaintiff's horse on the next day, and on such day the animal was injured by reason of the rottenness of the gangway, as it was being loaded on a car. It was held that the fact that by a subsequent arrangement, the horse was put upon the car from the depot platform, and thereafter a contract of shipment was signed exempting defendant carrier from

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liability for any loss, damage or injury to the horse while being loaded, etc., but containing no release of defendant from past liability, did not relieve defendant from liability for such injury.

Loss by Fire—Receipt Given after Shipment—Notice of Exemption after Loss.—In *Lamb v. Camden, etc., T. Co. v. 2 Daly* (N. Y.) 454, it appeared that plaintiffs agreed with defendant, a common carrier, for the carriage of certain bales of cotton at a specified freight rate; that, at the time the agreement was made, no bills of lading or shipper's receipts were given by the carrier, but after the goods had been shipped receipts were sent to the shippers, containing a clause exempting the carrier from liability for loss by fire; but this clause was not brought to the notice of the shippers until after the cotton had been destroyed by fire. It was held that such exemption clause was of no effect, and defendant was liable for the loss.

Baggage—Limiting Value—Ticket Received Day before Vessel Sailed, but after Property Was on Board.—But in *Wheeler v. Oceanic Steam Navigation Co.*, 79 N. Y. Sup. Ct. Rep. (72 Hun) 5, an action brought to recover the value of a case of portraits, delivered at Liverpool to defendant for transportation to New York, and not accounted for by it, plaintiff's mother testified that she informed the company's agent, at its Liverpool office, of the contents of such case, and then paid the passage money for plaintiff and herself which embodied a contract, by the terms of which it was sought to limit the liability of defendant for goods, including baggage, to an amount not exceeding ten pounds sterling. The contract ticket, in large display type, stated that it was a "cabin passenger contract ticket," and a person looking at it could not fail to observe that it contained conditions and stipulations relating to the journey of the holder. It was conceded that plaintiff's mother, if not the plaintiff herself, had been accustomed to cross the ocean, and, in respect to the particular voyage, had arranged for and secured their passage at least a week ahead, and that the contract ticket was received by them a day before the vessel sailed. It was held that, under the circumstances, the receipt of such ticket, with the terms and conditions printed on it, constituted a contract between the parties; that the failure of plaintiff's mother to read it was immaterial in this connection; and that the fact that the property was on board the ship, and it would have been impracticable to return it to plaintiff before the vessel sailed, was no excuse for plaintiff's silence or acquiescence if she had fault to find with the terms of the contract.

Contract Signed after Car Left Station—Failure to Read—Absence of Fraud—Reduced Rate—Prior Oral Agreement Merged.—In *Stewart v. Cleveland, etc., R. Co.*, 21 Ind. App. 218, 52 N. E. 897, it appeared that plaintiffs, under an oral agreement, arranged to ship a carload of stock over defendant's railroad, nothing being said as to the rate of freight to be charged. Shortly after the car left the station, plaintiffs, without any fraud or concealment on the part of

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defendant, signed a shipping contract, without reading it, which limited defendant's common-law liability as a common carrier. It was held that the reduction of the freight charges was a sufficient consideration for signing the special contract; that all contemporaneous agreements were merged in the written contract; and that defendant's liability as a common carrier was thereby limited to the terms thereof.

F. CONSIDERATION ESSENTIAL.

A condition in a shipping contract purporting to limit the common-law liability of the carrier must be supported by a valuable consideration apart from the mere acceptance of the property for transportation.

Arkansas.—*St. Louis, etc., Ry. Co. v. Coolidge* (Ark.), 83 S. W. 333.

Connecticut.—*Mears v. New York, etc., R. Co.*, 75 Conn. 171.

Indiana.—*Evansville, etc., R. Co. v. Kevekordes* (Ind. App.), 69 N. E. 1022; *Lake Erie & W. R. Co. v. Holland*, 162 Ind. 406, 9 R. R. R. 735, 32 Am. & Eng. R. Cas., N. S., 735, 69 N. E. 138; *Stewart v. Cleveland, etc., R. Co.*, 21 Ind. App. 218, 52 N. E. 89.

Missouri.—*Gowling v. American Express Co.*, 102 Mo. App. 366; *Rice v. Wabash R. Co.*, 106 Mo. App. 370; *Richardson v. Chicago, etc., R. Co.*, 149 Mo. 311, 50 S. W. 782; *Sloop v. Wabash R. Co.* (Mo. App.), 84 S. W. 111; *Wyrick v. Missouri, etc., R. Co.*, 74 Mo. App. 406.

Nebraska.—*Pennsylvania R. Co. v. Kennard Glass, etc., Co.*, 59 Neb. 435.

North Carolina.—*Gardner v. Southern R. Co.*, 127 N. Car. 293.

Texas.—*Missouri, etc., Co. v. Withes*, 16 Tex. Civ. App. 506; *St. Louis S. W. R. Co. v. McIntyre* (Tex. Civ. App.), 82 S. W. 346; *San Antonio, etc., Pass. R. Co. v. Wright*, 20 Tex. Civ. App. 136, 49 S. W. 147; *Texas & Pac. R. Co. v. Avery*, 19 Tex. Civ. App. Rep. 235, 46 S. W. 897.

West Virginia.—*Berry v. West Virginia & P. R. Co.*, 44 W. Va. 538, 30 S. E. 143; *Lewis v. Chesapeake & O. Ry. Co.*, 47 W. Va. 656, 35 S. E. 908; *Zouch v. Chesapeake, etc., Ry. Co.*, 36 W. Va. 524, 15 S. E. 185, 49 Am. & Eng. R. Cas. 702.

Wisconsin.—*Schaller v. Chicago, etc., R. Co.*, 97 Wis. 31, 71 N. W. 1042.

Mere Receipt of Goods and Undertaking to Carry.—The mere receipt of the goods and undertaking to carry is not a sufficient consideration to make binding a stipulation that the common carrier shall be exempt from any of its common-law liability. So held in *Wehmann v. Minneapolis, etc., Ry. Co.*, 58 Minn. 22, 59 N. W. 546.

Limiting Value.—In *Rosenfeld v. Peoria, etc., Ry. Co.*, 103 Ind. 121, 2 N. E. 344, 21 Am. & Eng. R. Cas. 87, it is held that in order that a common carrier may, by fixing the value of the goods received by it for transportation, restrict its liability, it must show

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that the shipper had knowledge of such restriction and for a sufficient consideration assented thereto, or that his statements and conduct justified the carrier in so fixing the value.

Same.—Where a common carrier limits its liability at a certain maximum sum in case of loss of the freight shipped by it, it must appear that there was a consideration for the limited valuation; before it can reduce the damage to such maximum amount. So held in *Richardson v. Chicago, etc., R. Co.*, 149 Mo. 311, 50 S. W. 782.

Necessity of Special Consideration—Limiting Value—Loading and Unloading Live Stock.—In *Crow v. Chicago, etc., R. Co.*, 57 Mo. App. 135, it is held that a stipulation in a shipping contract purporting to limit the damages recoverable against a common carrier for injury to freight is not binding unless it is supported by a special consideration; but such a consideration is not essential to other special restrictions of the carrier's responsibility embraced in the shipping contract, such as a stipulation as to the loading and unloading of live stock, or a provision for notice of damages within a stated time.

Same—Limiting Liability to Own Line.—A common carrier may, without a special consideration, restrict its liability to loss or damage occurring on its own route. So held in *Hance v. Wabash Ry. Co.*, 56 Mo. App. 476.

Same—Cattle Delayed—Limiting Damages to Cost of Extra Food.—In *Rice v. Wabash R. Co.*, 106 Mo. App. 370, it is held that a condition in a shipping contract that, in case of unusual delay, the shipper's damages should be restricted to the amount spent for food and water for the cattle, did not relieve the company of its common-law liability for negligently permitting such delay, in the absence of a special consideration for such provision.

Loss by Fire.—A contract of exemption of a common carrier from liability as insurer, for loss by fire, etc., must be founded upon some consideration. So held in *Taylor v. Little Rock, etc., R. Co.*, 39 Ark. 148, 18 Am. & Eng. R. Cas. 590.

Limiting Liability to Own Line—Validity of Subsequent Bill of Lading, Signed to Secure Stock Passes for Employees.—In *San Antonio, etc., Pass. R. Co. v. Wright*, 20 Tex. Civ. App. 136, 49 S. W. 147, it appeared that horses were received for shipment under an agreement with the shipper fixing the point of destination and price per car, but that subsequently a written contract was signed by the shipper purporting to limit the carrier's liability to its own line. It was held that the latter contract was without consideration and void, although the shipper was required to sign it in order that passes might issue to the men who accompanied the stock.

Subsequent Written Contract Signed When Train Was About to Start.—In *Missouri, etc., R. Co. v. Carter*, 9 Tex. Civ. App. 677, it appeared that the shipper agreed with the agent of the railroad company upon terms for transporting his cattle; that the cattle were delivered for carriage, and were loaded upon the train under and in ac-

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cordance with the parol contract. When the train was about starting, a written contract was presented to the shipper for his signature. He examined it so far as to discover that the rate was as agreed upon, and then signed it, not knowing that it contained onerous conditions in favor of the carrier. There was no consideration for his signing the written contract. It was held that such writing did not supersede the parol contract, and did not affect the shipper's rights.

Waiver of Claims in Favor of Carrier—Subsequent—Refusal to Allow Reduced Rates.—In *Gulf, etc., Ry. Co. v. McCarty*, 82 Tex. 608, 18 S. W. 716, it appeared that a contract for the transportation of cattle was agreed upon at a specified charge per car load. Subsequently, and upon the cattle being taken upon the cars, a freight bill was signed containing a waiver of certain claims by the shipper in favor of the carrier in consideration of reduced freight rates. No reduced freight charges were allowed. It was held that, there being no consideration for such waiver, it could be allowed no effect.

"Lowest Rates" Asked for by Shipper.—That a shipper asked for the "lowest rates" on certain goods, and accepted the rates offered in reply, sufficiently shows that there was such a reduction in the regular charges as to support a contract restricting the carrier's liability. So held in *Jennings v. Grand Trunk Ry. Co.*, 5 N. Y. Supp. 140, 23 N. Y. S. R. 15, 52 Hun 227.

Fire without Negligence—Reduced Rates.—Reduced rates for the carriage of freight constitutes a sufficient consideration to support a special contract, whereby a common carrier is exempt from liability for the loss of goods during transportation, by fire, without the carrier's negligence. So held in *Mouton v. Louisville, etc., R. Co.*, 128 Ala. 537.

Independent Consideration Not Expressed in Bill of Lading.—It is not necessary that there be an independent consideration apart from that expressed in the bill of lading to support a reasonable stipulation of exemption of the common carrier from liability. So held in *Cau v. Texas, etc., R. Co.*, 194 U. S. 427, 24 Sup. Ct. Rep. 663, 48 L. Ed. 1053, 13 R. R. R. 303, 36 Am. & Eng. R. Cas., N. S., 203.

G. PRESUMPTION AS TO CONSIDERATION.

In the absence of evidence to the contrary, it is a legal presumption that there was a fair consideration moving from the carrier to the shipper for a condition in a special contract purporting to limit the common-law liability of the carrier. *Schaller v. Chicago, etc., R. Co.*, 97 Wis. 31, 71 N. W. 1042.

Want of Consideration Must Be Affirmatively Established.—The presumption is that the rates for carriage of freight are made with reference to the risks assumed, and that the rate specified in a special shipping contract, when made, was intended to support the entire contract, hence the want of consideration must be affirmatively established by the party seeking to avoid such limitation of the car-

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rier's liability. So held in *Schaller v. Chicago, etc., R. Co.*, 97 Wis. 31, 71 N. W. 1042.

No Presumption That Limitation Is Not Based upon Good Consideration.—When a bill of lading is based upon a valuable consideration, there is no presumption that a limitation of the common-law liability contained in it is not based upon a good and sufficient consideration. So held in *St. Louis, etc., Ry. Co. v. Hurst*, 67 Ark. 407, 55 S. W. 215.

Rebuttal of Presumption—Same Rate Charged When No Bill of Lading.—Where the special contract purporting to limit the carrier's common-law liability relied on by defendant was contained in the bill of lading, the presumption in favor of a consideration for it was not rebutted by the evidence that in many cases the same rate was charged when no bill of lading was given. So held in *Schaller v. Chicago, etc., R. Co.*, 97 Wis. 31, 71 N. W. 1042.

Restriction Forbidden by Law.—But no statement or concession in rates will be presumed to be a consideration for a stipulation purporting to restrict the common-law liability of a common carrier, where such an abatement is forbidden by law. So held in *Wehmann v. Minneapolis, etc., Ry. Co.*, 58 Minn. 22, 59 N. W. 546.

Unrestricted Receipts for Freight Delivered in Car-Load Lots—Stipulation in Subsequent Bills of Lading.—From unqualified and unrestricted receipts issued by the carrier when freight was delivered to it in car-load lots, and the bills of lading issued subsequently in lieu of such receipts, the presumption arose that there was no consideration for a stipulation in the bills of lading whereby the carrier attempted to relieve itself from its common-law liability in case the freight was lost in transit by fire or other casualty, and therefore such stipulation was not binding. So held in *Southard v. Minneapolis, etc., Ry. Co.*, 60 Minn. 382, 62 N. W. 442.

H. REDUCED RATE AS CONSIDERATION—CHOICE.

In order that a reduced freight rate may constitute a sufficient consideration for a stipulation in a special contract purporting to limit the carrier's common-law liability, it must appear that the shipper had a genuine choice between two reasonable rates. *Mears v. New York, etc., R. Co.*, 75 Conn. 171; *Atchison, etc., R. Co. v. Dill*, 48 Kan. 210, 29 Pac. 148, 55 Am. & Eng. R. Cas. 375; *Atchison, etc., R. Co. v. Mason*, 4 Kan. App. 391, 46 Pac. 31; *Louisville & N. R. Co. v. Gilbert, Parkes & Co.*, 88 Tenn. 430, 12 S. W. 1018; *Nashville, etc., R. Co. v. Stone*, 79 S. W. 1031, 112 Tenn. 348, 367.

Limited to Damages from Gross Negligence—Failure to Give Option.—Where there is but one contract and one rate open and offered to the shipper by a common carrier, and no option is given him, a special provision limiting the common-law liability of the carrier to "loss or damage occasioned by wrongful acts or gross negligence" is without consideration and void. So held in *Illinois Cent. R. Co.*

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v. Lancashire Ins. Co., 79 Miss. 114, 21 Am. & Eng. R. Cas., N. S., 840, 30 So. 43.

Bill of Lading Accepted by Shipper with Knowledge of Its Terms—His Knowledge of Limited Authority of Carrier's Agent.—A carrier cannot limit its common-law liability for loss or damage not occasioned by its negligence unless the shipper is afforded an opportunity to contract for the service required without such restriction; and it is immaterial in this connection that the shipper knowingly accepted a bill of lading containing such restriction without demanding a different contract, if he knew the carrier's agents had no authority to make any other kind of contract with him. So held in *Little Rock, etc., Ry. Co. v. Cravens*, 57 Ark. 112, 20 S. W. 803.

Carrier's Rules Printed in Bill of Lading—Shipper Required to Accept Bill of Lading as Condition Precedent to Privilege of Shipping.—Restrictions upon the common-law liability of a carrier, contained in a bill of lading for the shipment of live stock, are unreasonable and void, notwithstanding it is recited therein that the limitations were agreed to by shipper in consideration of a reduced rate, if the carrier's rules, printed on the bill of lading, would not have permitted the live stock to be shipped unless the shipper accepted the bill of lading with its restrictions. So held in *St. Louis, etc., Ry. Co. v. Spann*, 57 Ark. 127, 20 S. W. 914.

Subsequent Written Contract Executed When Train Was Ready to Start with Cattle—Duress.—In *Texas & Pac. Ry. Co. v. Avery*, 19 Tex. Civ. App. 235, 46 S. W. 897, it is held that where a railroad's agent has orally, and without limitation of its common-law liability, contracted to transport cattle at a specified rate per car, and on the faith of which agreement the cattle are loaded on the cars, it cannot, as a condition of transporting the cattle, afterwards require the shipper to execute a written contract increasing the price of the cars and restricting the liability of the carrier; and such a contract when executed by the shipper when the train was ready to start with the cattle, and because the railroad agent refused to transport them until it was signed, is without consideration and void because executed under duress.

Shipper Required to Sign Special Contract—Threat to Unload Cattle—Full Rate Exacted.—In *Kansas Pac. Ry. Co. v. Reynolds*, 17 Kan. 251, it appeared that the appellant railroad had in fact only one rate at which it carried or offered to carry cattle from O. to S., although it had pasted up in the office of its agent at O. other and higher rates; that an owner of cattle, without anything being said about any special rate, but with the consent of the company, placed his cattle in the company's cars at O. to be carried to S., and the agent of the company at O. then presented to the shipper a special contract for carrying the cattle at the full rate at which the company carried cattle, though less than such posted rate, and with certain limitations as to the company's responsibility, and the agent

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then demanded that the shipper should sign such special contract or have his cattle unloaded, and gave to the shipper no other option, and the shipper then signed the special contract. It was held that the special contract, so far as it purported to limit the liability of the railroad company, was without consideration and void.

Duress—Choice—Falsity of Contract Recitals—Parol Evidence.—

Where a contract limiting the carrier's liability for damages to a shipment is extorted from the shipper by a refusal to ship on any other terms, he may show the falsity of recitals in the contract that opportunity was given him to ship on more favorable terms, but that he elected to accept the restrictive contract upon a lower rate. So held in *St. Louis, etc., R. Co. v. Wells* (Ark.), 22 R. R. R. 774, 45 Am. & Eng. R. Cas., N. S., 774.

Reduced Rate—Same Rate Charged Everybody Shipping under Like Contracts.—In *Duvenick v. Missouri Pac. Ry. Co.*, 57 Mo. App. 550, it is held that it does not follow that because the rate charged in a given contract is the same rate charged everybody who ships under like contracts it is not a reduced rate, so as to be a sufficient consideration for a restriction of a carrier's liability; for if the carrier has in force and for practical application a higher rate for shipments made without contracts than the rate charged in a given contract containing a release, then the given contract has a sufficient consideration to support the release when the reduced rate is given in view of the release.

Fire Clause Exemption in Through Bill of Lading—Connecting Carriers without Arrangement Inter Sese.—If otherwise unobjectionable, a fire-clause exemption contained in a through bill of lading, stipulating for shipment at special rates over several distinct, independent connecting lines, is not void because the several carriers had no arrangement inter sese whereby the shipper could, upon demand, have obtained continuous through transportation upon terms of unrestricted liability of the carriers. So held in *Deming v. Merchants' Cotton Press, etc., Co.*, 90 Tenn. 306, 17 S. W. 89.

Fire—Option Not Actually Presented to Shipper.—In *Cau v. Texas, etc., R. Co.*, 194 U. S. 427, 13 R. R. R. 303, 36 Am. & Eng. R. Cas., N. S., 303, 24 Sup. Ct. Rep. 663, 48 L. Ed. 1053, it is held that an exemption of a carrier from liability for damages caused by fire, expressed in the bill of lading, may be valid, although the option or opportunity to ship the goods under the common-law liability was not actually presented to the shipper by the carrier.

Mere Failure to Tender Another Contract.—A shipping contract limiting the value of the freight may be valid, although the carrier did not actually tender another without the clause as to the value of the freight, if he offered to ship, upon reasonable terms, under a bill of lading containing no limitation as to value, or was ready to do so upon demand being made by the shipper. So held in *Railway Co. v. Sowell*, 90 Tenn. 17, 15 S. W. 837.

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Option to Ship under Other than Special Contract—Evidence—Instructions to Carrier's Agents.—Where there is a question as to whether the carrier offered or was ready to ship under any other than the special contract limiting value, it is error to reject evidence tending to show that shippers were allowed choice of contracts under which to ship, and to show the instructions given by the carrier to his agents for their guidance when a shipper rejected the special contract. So held in *Railway Co. v. Sowell*, 90 Tenn. 17, 15 S. W. 837.

Bill of Lading—Reduced Rate—No Rate Specified nor Talked of.—The stipulation in a bill of lading purporting to limit the carrier's liability will not be held binding on the ground that a reduced rate was intended, where no rate is specified, and none talked of by the parties. *Phoenix Powder Mfg. Co. v. Wabash Ry. Co.*, 101 Mo. App. 442.

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Induced to Sign by Fraudulent Assurance of Agent—Evidence.—In an action by the shipper of stock against a railway company to recover damages for negligence and delay in transportation, and a special written or printed contract is set up to defeat the action for noncompliance with its terms and conditions, the shipper may show the circumstances under which he executed the instrument, when he claims that he was intentionally deceived by the carrier's agent and induced to sign it without having time to examine its contents, under the fraudulent assurance that it was only a pass. So held in *Black v. Wabash, etc., Ry. Co.*, 111 Ill. 351, 25 Am. & Eng. R. Cas. 388.

Notice of Claim—Compliance—Information—Insertion in Bill of Lading.—A stipulation in a bill of lading that the shipper must give notice of a claim for damages within a certain time is not binding, unless, in the absence of the necessary knowledge on his part, the necessary information to enable him to comply with it is inserted in the bill of lading. So held in *Norfolk & W. Ry. Co. v. Reeves*, 97 Va. 284, 16 Am. & Eng. R. Cas., N. S., 166, 33 S. E. 606.

Failure to Insert Value in Order to Obtain Lowest Rate—Fraud.—In *Pacific Express Co. v. Pitman*, 30 Tex. Civ. App. 626, it is held that where the express charges for carrying packages the value of which exceeds \$50 were greater than where no value was stated, and the shipper knew this, but for the purpose of obtaining the lowest rate failed to insert the value in the receipt, and the express company did not know the true value, but, if it had had such knowledge, would have made a greater charge and used greater precaution, such failure to state the value was such a fraud on the express company as to discharge it from liability beyond the value of \$50, where the package was stolen.

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V. CONFLICTING AGREEMENTS.**A. EXISTENCE OF MORE THAN ONE AGREEMENT—RIGHT OF CARRIER TO ELECT.**

Where there exists more than one agreement as to the terms under which freight shall be transported by a common carrier covering the same shipment, and a loss or injury to the goods occurs, the contract most advantageous to the shipper and which least restricts the carrier's liability is the one which the law will declare the contract by which the carrier's obligations shall be determined; the latter not being allowed to choose the one limiting its liabilities, or limiting them to the greater extent. *Woodburn v. Cincinnati, etc., R. Co. (C. C.)*, 40 Fed. Rep. 731, 42 Am. & Eng. R. Cas. 514; *Munn v. Baker (Eng.)*, 2 Stark, 255.

Shipping Receipt and Release—Separate and Distinct Papers—Only Partial Loss—Receipt Not Applicable—Void Release.—In *Woodburn v. Cincinnati, etc., Ry. Co. (C. C.)*, 40 Fed. Rep. 731, 42 Am. & Eng. R. Cas. 514, it appeared that plaintiff made a shipment on a railroad connecting with defendant's, and took a receipt from the agent, which stated that the railroad company was "not accountable for weight, number, or condition of the packages." Following this was the name of plaintiff, destination of the goods on defendant's road, and the words, "Valuation limited to \$5.00 per 100 pounds in case of total loss." On the back was printed a statement that "when a valuation agreed upon shall be named upon this shipping receipt, it is distinctly understood that such valuation shall cover loss or damage from any cause whatever," also a printed statement that the owner of the goods, in accepting the receipt, agrees to be bound by all its stipulations, written or printed, as fully as though signed by him. Plaintiff then signed and delivered to the company a paper stating that he had voluntarily shipped at a lower rate than the general tariff, on condition that he release the company from all liability for loss or damage, and containing a formal release to the company, and all other railroad or transportation companies to whom the goods should be delivered for transportation. This release was attached to the manifest, went along with the goods, and was received by defendant. The shipping receipt was not under seal, or witnessed, and was retained by plaintiff. The goods were received by defendant at a freight rate agreed on between the railroads. It was held that the shipping receipt and release were separate and distinct papers, prepared and signed at the instance of the company receiving the freight; that defendant could not, in its own interest, elect which of the two should be treated as the shipping contract; that the shipping receipt, not having been executed as a contract under seal, and not having been regarded and treated as one by either of the railroad companies, and having been put forward as the rate of indemnity on a total loss when there was only a partial loss, could not be made the basis of plaintiff's recovery; and that, as the release executed by plaintiff

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provided for a complete and unconditional exemption of the carrier from liability on account of loss or damage to property in the course of transportation, it was void, as against public policy, and plaintiff was entitled to recover for the full value of the goods lost.

B. PRESUMPTION AS TO COMPLETENESS OF WRITTEN CONTRACT.

As a general rule, the law presumes that a shipping contract in writing embraces the entire agreement between the parties, and it cannot be varied or contradicted by parol testimony.

Alabama.—Tallehassee Falls Mfg. Co. *v.* Western R. Co., 117 Ala. 520, 23 So. 139.

Georgia.—McElveen *v.* Southern R. Co., 109 Ga. 249, 34 S. E. 281.

Illinois.—Lake Shore, etc., R. Co. *v.* National Live Stock Bank, 178 Ill. 506, 53 N. E. 326.

Indiana.—Evansville, etc., R. Co. *v.* Kevekordes (Ind. App.), 69 N. E. 1022; Stewart *v.* Cleveland, etc., R. Co., 21 Ind. App. 218, 52 N. E. 89.

Iowa.—Burgher *v.* Chicago, etc., R. Co., 105 Iowa, 335, 75 N. W. 192.

Louisiana.—Sonia Cotton Oil Co. *v.* Steamer Red-River, 106 La. 42.

Mississippi.—Yazoo, etc., R. Co. *v.* Wilson, 83 Miss. 224.

North Carolina.—Morganton Mfg. Co. *v.* Ohio River, etc., R. Co., 121 N. Car. 514, 28 S. E. 474.

Ohio.—Stevens *v.* Lake Shore, etc., Ry. Co., 11 Ohio Cir. Dec. 168, 20 Ohio Cir. Ct. 41.

Texas.—Bessling *v.* Houston, etc., R. Co. (Tex. Civ. App.), 80 S. W. 639; Ft. Worth, etc., R. Co. *v.* Wright, 24 Tex. Civ. App. 291, 58 S. W. 846.

Bill of Lading, Receipt, or Other Voucher as Sole Evidence of Final Agreement.—In Long *v.* N. Y. Cent. R. Co., 50 N. Y. 76, 3 Am. Ry. Rep. 350, it is held that where the shipper takes from the carrier a bill of lading, receipt or other voucher expressing the terms upon which the property is to be carried, the writing, in the absence of proof of fraud or mistake, must be taken as the sole evidence of the final agreement of the parties, and resort cannot be had to prior parol negotiations to vary its terms.

Bill of Lading as Contract of Shipment.—In the absence of fraud and mistake, a bill of lading signed by the receiving agent of a common carrier, containing no restriction upon its common-law liability, delivered to the consignor contemporaneously with the receipt of the goods for shipment and acquiesced in by him, becomes the contract of shipment, and its terms cannot be contradicted by parol. So held in Cleveland, etc., Ry. Co. *v.* La Tourette, 1 Ohio Cir. Dec. 486.

Bill of Lading Not a Mere Receipt for Goods.—The terms of a bill of lading as written, to the extent that it is a contract and not a mere receipt for goods, are not to be changed by verbal testimony, except

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in case of error or fraud. So held in *Cotton Oil Co. v. Steamer Red River*, 106 La. Rep. 42.

Bills of Lading as Strictly Written Contracts.—In *Illinois Cent. R. Co. v. Schwartz*, 13 Ill. App. 490, it is held that the shipping contract sued on cannot be altered by any previous verbal agreement of the parties not incorporated into it; and, except in the recital or the acknowledgment of the goods and of their quantity and their condition when received, bills of lading are strictly written contracts, and come within the general rule which prohibits the introduction of parol evidence to contradict or vary written contracts.

Bill of Lading as Both Contract and Receipt.—A bill of lading is both a contract and receipt; and, as a contract to carry and deliver the goods upon the terms and conditions specified in the instrument, it cannot be explained by parol testimony so as to change its legal effect, in the absence of fraud or mistake; but, as a receipt or acknowledgment of the quantity, character or condition of the articles, it may be explained, varied or contradicted like any other receipt. So held in *Morganton Mfg. Co. v. Ohio River, etc., Ry. Co.*, 121 N. Car. 514, 28 S. E. 474.

Time of Delivery—Silence of Bill of Lading.—In *Central R., etc., Co. v. Hasselkus*, 91 Ga. 382, 17 S. E. 838, it is held that the bills of lading being silent as to the time within which delivery of freight was to be made, the law presumes it was to be done in a reasonable time, and parol evidence is not admissible to negative this presumption by showing that a definite and specific time was agreed upon either expressly or by implication.

Stowage on Deck—Oral Agreement—Silence of Bill of Lading.—A bill of lading which is silent as to the place of stowage of the freight imports a contract that it is to be stowed under deck, therefore, an alleged agreement that it should be stowed on deck was inadmissible. So held in *The Delaware*, 14 Wall. (U. S.), 579.

Limiting Liability to Own Line—Written Contracts Executed in Order to Secure Free Transportation—Through Line Waybill.—In an action against a railroad for damages to cattle sustained during their carriage over its own and connecting line, defendant introduced written contracts for the shipment of the cattle to a point on defendant's line, and which limited its liability to damage occurring on its own line. Plaintiff claimed that the cattle had been loaded under a verbal agreement for through carriage, and that he had been forced to execute the written contracts in order to get the cattle moved, and that although the written contracts called for delivery at a point on defendant's line, the real contract was for through shipment. The only evidence as to the written contracts was that they were executed by plaintiff's direction in order to secure free transportation for his helpers. It was held that, in the absence of evidence of any fraud, compulsion, or want of time to read the written contracts, they must be taken as merging all previous understandings between the

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parties; that the waybill issued by defendant for the guidance of its employees which denominated plaintiff's shipment as a through live stock waybill to a point on the connecting line, via the point on defendant's line specified in such written contracts, did not charge or affect the terms of the written contracts. *San Antonio, etc., Ry. Co. v. Barnett* (Tex. Civ. App.), 1 R. R. R. 789, 24 Am. & Eng. R. Cas., N. S., 789, 69 S. W. 474.

Receipt Not Conclusive Evidence.—But a receipt given by a railroad company for freight intrusted to it for transportation, purporting to limit the carrier's liability, is not conclusive evidence of the terms of the shipping contract. So held in *Pereira v. Central Pac. R. Co.*, 66 Cal. 92, 4 Pac. 988.

Declaration of Value—Other Failures of Agent to Require—Evidence.—Where the defense is that the carrier's agent had no authority to make the shipping contract without requiring a declaration of the value of the goods, evidence that the agent had made contracts with other parties without requiring such declaration to be made, before and at the time of the alleged contract with plaintiff, is admissible as direct evidence for the purpose of defining the contract as actually made. So held in *Lowenstein v. Lombard, Ayres & Co.*, 164 N. Y. 324.

Oral Contract—Subsequent Bill of Lading—Question for Jury.—In *St. Louis, etc., Ry. Co. v. Clark*, 48 Kan. 321, 29 Pac. 312, an action to recover damages for the death of hogs which had been transported over the appellant railroad, the shipper claimed and testified that an oral contract was made for transportation, to a point beyond the line of the contracting railroad, in which there was no limitation of the carrier's liability and that the stock was shipped under such contract; that after the stock was loaded and had left the station, he signed a paper which he could not well read, but which he supposed to be a receipt containing nothing inconsistent with such oral contract. The railroad offered testimony to show that the only contract made with the shipper was the written one embodied in the bill of lading signed by the shipper, and which, to a great extent, limited the liability of carrier. It was held that the court was warranted in submitting to the jury the question of what constituted the shipping contract.

C. COMPLETED CONTRACT—SUBSEQUENT BILL OF LADING.

A completed contract, containing all the terms under which the shipment was undertaken, cannot be affected by a subsequent bill of lading purporting to limit, or limit to a greater extent, the liability of the carrier.

United States.—*Farmers' Loan & Trust Co. v. Northern Pac. R. Co.* (C. C. A.), 120 Fed. Rep. 873.

Illinois.—*Boscowitz v. Adams Express Co.*, 93 Ill. 523, 34 Am. Rep.

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191; *Cleveland, etc., R. Co. v. Wilson*, 99 Ill. App. 367; *Fortier v. Pennsylvania Co.*, 18 Ill. App. 260; *St. Louis S. W. R. Co. v. Elgin Condensed Milk Co.*, 74 Ill. App. 619, 13 Am. & Eng. R. Cas., N. S., 112.

Indiana.—*Cleveland, etc., R. Co. v. Potts*, 33 Ind. App. 564.

Michigan.—*Rudell v. Ogdensburg Transit Co.*, 117 Mich. 568, 76 N. W. 380.

Ohio.—*American Roofing Co. v. Memphis, etc., Packet Co.*, 8 Ohio Dec. 490.

South Carolina.—*Piedmont Mfg. Co. v. Columbia & G. R. Co.*, 19 S. Car. 353, 16 Am. & Eng. R. Cas. 194.

Texas.—*Missouri, etc., Co. v. Withers*, 16 Tex. Civ. App. 506; *San Antonio, etc., Pass. R. Co. v. Wright*, 20 Tex. Civ. App. 136, 49 S. W. 147; *South. Pac. R. Co. v. Anderson*, 26 Tex. Civ. App. 518, 63 S. W. 1023.

Subsequent Acceptance of Bill of Lading without Assent.—Where freight is shipped under an oral agreement, before any written contract or bill of lading has been tendered to the shipper, the subsequent acceptance of a bill of lading without assenting to its purported limitations of the carrier's liability will not affect the rights of the shipper. So held in *Merchants' Despatch Transp. Co. v. Furthman*, 149 Ill. 66, 36 N. E. 624.

Subsequent Bill of Lading Accepted without Reading—Attention Called to Changes—Burden of Proof.—In *The Arctic Bird* (D. C.), 109 Fed. 167, it appeared that freight was delivered to and laden upon a vessel for shipment, and receipt given therefor, under a written contract for its carriage. It was held that the terms of such contract could not be changed, so as to restrict the carrier's liability, by a bill of lading subsequently delivered by it to the shipper, and accepted by him without reading, unless it is shown that his attention was called to such changes, so that he may be presumed to have assented to them.

Verbal Contract to Carry to Destination—Burden on Carrier to Show Assent to Subsequent Bill of Lading.—Where a verbal shipping contract is made by which freight is to be carried to its destination, but the bill of lading then made is merely to carry to the next carrier, the shipper not noticing this, the verbal contract is competent evidence, and the burden is on the carrier, to show assent by the shipper to a change in its terms. So held in *Pittsburg, etc., R. Co. v. Blakemore*, 1 O. C. C. 42, 1 O. C. D. 26.

Verbal Contract Made by Shipper—Bill of Lading Merely Handed to Shipper's Clerk.—The terms of a bill of lading purporting to restrict the carrier's liability, handed by the carrier to the shipper's clerk, and never brought to the shipper's attention, will not prevail as against a verbal contract of shipment previously made by the shipper with the carrier's authorized agent. So held in *Rudell v. Ogdensburg Transit Co.*, 117 Mich. 568, 76 N. W. 380.

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Contract Made by Prospective Consignee—Bill of Lading Given to Consignor.—Where a contract for carriage is made by a prospective consignee with the carrier's agent in one place, and his consignor, in another place, pursuant to the consignee's instructions, ships the goods at such place, the bill of lading given by the carrier to the consignor at the latter place does not constitute the contract between the carrier and consignee; the rule that oral negotiations are merged in the written instrument having no application. So held in *Lowenstein v. Lombard, Ayres & Co.*, 164 N. Y. 324.

Verbal Agreement to Furnish Refrigerator Cars for Transportation of Milk over Whole Route Made with Terminal Carrier—Bill of Lading Issued by Initial Carrier.—A verbal agreement to furnish refrigerator cars for the transportation of milk over the whole route, made by the terminal carrier to induce plaintiff to send it to the terminal carrier for transportation to its destination, is not superseded by a subsequent written contract expressed in the bill of lading issued by the initial carrier, by which the latter sought to limit its liability. So held in *St. Louis S. W. R. Co. v. Elgin Condensed Milk Co.*, 74 Ill. App. 619, 13 Am. & Eng. R. Cas., N. S., 112.

Verbal Contract for Through Transportation—Application of Conditions of Bills of Lading Signed by Shipper's Agents without Express Authority.—In *Jennings v. Grand Trunk Ry.*, 127 N. Y. 438, 28 N. E. 394, it appeared that defendant carrier contracted to transport several car loads of potatoes from certain points on its line to the place of destination, which was beyond that line, at a fixed price, of which defendant's station agents were advised; that the persons who delivered the potatoes on the part of the shippers, signed bills of lading made out on blanks kept by defendant for that purpose, and filled out by its agent in conformity with its general requirement and custom on receipt of goods for carriage. The shipping bills purported to be requests on the part of the person signing them that defendant should receive the freight subject to the terms and conditions stated in or upon the bills of lading, which limited defendant's common-law liability in various particulars. The shippers had no knowledge of the bills of lading and did not expressly authorize their agents, who delivered the property, to execute them. They, however, knew it to be the general custom of railroad companies to require bills of lading containing the conditions of shipment. In an action to recover for the nondelivery of one car load of potatoes and for delay in the delivery of the others, it was held that conceding it to have been within the presumed authority of those who delivered the potatoes to make or accept conditions for the carriage of the property, beyond that, so far as it was dependent upon such presumption of authority, the owners were not necessarily bound by anything contained in such bills of lading; that the provisions of the bills of lading, so far as they may otherwise be construed, were not applicable to the shipments in question; and that, therefore, only the terms and con-

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ditions so far as were reasonable and applicable to through transportation were to be deemed within the terms of the contract.

Controlling Prior Verbal Agreement—Parol Evidence.—Although a common carrier, when receiving goods for transportation issues a bill of lading therefor, containing conditions purporting to restrict its common-law liability, the shipper may show by parol that there was a controlling prior verbal agreement under which the goods were shipped, and which did not provide for the restrictions upon the carrier's liability contained in the bill of lading. So held in *Baker v. Michigan, etc., R. Co.*, 42 Ill. 73.

Suit on Oral Contract—Written Contract Signed by Shipper's Agent—Opportunity to Read—Notice—Former Dealings.—But in *Ft. Worth, etc., R. Co. v. Wright*, 24 Tex. Civ. App. Rep. 291, 58 S. W. 846, it appeared that plaintiff sued on an oral contract entered into by him with defendant's agent for the carriage of his horses over defendant's and connecting lines, and defendant having pleaded a written contract of shipment limiting its liability to its own lines, plaintiff's agent in charge of the horses testified that the written contract was signed by him in ignorance of its contents, as he did not have time to read it before the train carrying the stock left the depot. There was also evidence to the effect that the prior oral contract was a mere inquiry by plaintiff and an answer thereto by the carrier's agent stating the through rate; and that plaintiff and his agent had made such shipments before, and had always signed written contracts such as the one in question. It was held that it was error to refuse a requested charge to the effect that if the shipper, from former dealings with defendant, knew that it was the regular custom for the shipper to sign such a written contract as the one in question, and that when he inquired of the carrier's agents as to the best freight rate to the destination of the stock he contemplated entering into the written contract when the horses should be shipped, and that he knew, or could have known, from previous dealings, what stipulations were in the contract, the verdict should be for defendant.

D. PAROL AGREEMENT SUBSTITUTED FOR WRITTEN CONTRACT.

Where it appears that a parol agreement has been substituted for a written shipping contract, the former may prove to be the controlling agreement; and to establish this evidence of conversation between the shipper and carrier's freight agent is admissible. *Toledo, etc., R. Co. v. Levy*, 127 Ind. 168, 26 N. E. 773.

In *Toledo, etc., R. Co. v. Levy*, 127 Ind. 168, 26 N. E. 773, it is held that evidence of a conversation between the shipper and the railroad company's agent is admissible to prove that a written contract for transportation was abandoned, and that the cattle were shipped under a parol contract subsequently made.

Reduced Rate—Mere Recital in Bill of Lading.—And a mere recital

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or acknowledgment in a bill of lading that a reduction in the usual freight rate has been made and accepted in consideration of a qualification of the carrier's common-law liability is not conclusive, but the real transaction may be shown by parol. So held in *Lake Erie & W. R. Co. v. Holland*, 162 Ind. 406, 9 R. R. R. 735, 32 Am. & Eng. R. Cas., N. S., 735, 69 N. E. 138.

Delivery with Special Dispatch—Guarantee—Parol Evidence to Vary Receipt.—And the acceptance by a shipper from a common carrier of a receipt for freight delivered for transportation, without reading it and supposing it to be merely a receipt, though it contained stipulations so indorsed upon it as to become a part of it, if treated as a contract, to the effect that the carrier did not guarantee any special dispatch in the carriage of any article, unless it was expressly so stipulated in writing, did not, under the circumstances of its reception, conclude the shipper from showing by parol that the carrier did guarantee the delivery of the freight at its destination with special dispatch at a particular time. So held in *King v. Woodbridge*, 34 Vt. 565.

"K. D. & Released"—Parol Evidence to Explain.—And where the bill of lading accepted by the shipper, after specifying the articles shipped, contains the words "K. D. & Released," it is competent for the railroad agent issuing such bill of lading to explain what these words meant, and the testimony of such agent that by the word "Released" was meant that the carrier was released by the shipper from liability for loss not occasioned by the carrier's negligence is admissible. So held in *Mouton v. Louisville, etc., R. Co.*, 128 Ala. 537.

E. ONLY PART OF CONTRACT CONTAINED IN WRITTEN AGREEMENT.

And evidence of the terms of prior agreements between the parties is admissible to complete the shipping contract, where it appears that a subsequent written agreement contains only part of such contract. *Union R. Co. v. Riegel*, 73 Pa. St. 72; *Harrison v. Missouri Pac. R. Co.*, 74 Mo. 364, 41 Am. Rep. 318, 7 Am. & Eng. R. Cas. 382.

VI. CONFLICTING LAWS.

A. LEX LOCI CONTRACTUS.

As a general rule, the laws of the state or country where a contract purporting to limit the common-law liability of a carrier is entered into to govern it and determine its validity.

United States.—*Central of Georgia Ry. Co. v. Kavanaugh* (C. C. A.), 92 Fed. Rep. 56, 13 Am. & Eng. R. Cas., N. S., 119; *The Henry B. Hyde*, 82 Fed. Rep. 681.

Georgia.—*Kavanaugh v. Southern R. Co.*, 120 Ga. 62.

Kentucky.—*Adams Express Co. v. Walker* (Ky.), 83 S. W. 106; *Cleveland, etc., Ry. Co. v. Druen* (Ky.), 80 S. W. 778, 11 R. R. R. 447, 34 Am. & Eng. R. Cas., N. S. 447; *Hutchison v. Louisville, etc., R. Co.*, 108 Ky. 615, 57 S. W. 251.

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Massachusetts.—*Brockway v. American Express Co.*, 171 Mass. 158, 50 N. E. 626.

Minnesota.—*Powers Mercantile Co. v. Wells*, 93 Minn. 143.

Missouri.—*Herf, etc., Chemical Co. v. Lackawanna Line*, 100 Mo. App. 164.

Nebraska.—*Pennsylvania R. Co. v. Kennard Glass, etc., Co.*, 59 Neb. 435.

New York.—*Grand v. Livingston*, 158 N. Y. 688, 53 N. E. 1125.

Texas.—*Pacific Express Co. v. Pitman*, 30 Tex. Civ. App. 626; *Pittman v. Pacific Express Co.*, 24 Tex. Civ. App. 595.

Circus Train—Contract Valid Where Made, and Not Contrary to Public Policy of Pennsylvania.—In *Forepaugh v. Delaware, etc., R. Co.*, 128 Pa. St. 217, 18 Atl. 503, it is held that a contract made in New York, by which, in consideration of the transportation of a circus train over a railroad in that state, the owner voluntarily agrees to release the railroad company from responsibility for negligence, being valid in New York, will be enforced in Pennsylvania, as it is not contrary to justice or morality and its enforcement will not derogate from the laws or settled policy of Pennsylvania.

Shipped from Boston to Buffalo—Negligence—Exemption Void under Laws of Massachusetts—Lex Loci Contractus.—In *Grand v. Livingston*, 4 N. Y. App. Div. Rep. 589, an action for damages from injuries claimed to have been sustained by certain horses while in transit, against defendant, an express company, it appeared that the horses were shipped from Boston to Buffalo under a contract containing a release void under the laws of Massachusetts, which purported to exempt defendant from liability for the negligence of its servants, and that the property was forwarded entirely at the owner's risk. It was held that the contract must be construed under the law of Massachusetts, where it was executed, unless it could fairly be said that the parties, at the time of its execution clearly manifested an intention that it should be governed by the law of New York; and that the fact that no such intention existed might be presumed from the circumstances that a release, taken from two persons who were to accompany the horses upon their journey expressly provided that any question which arose under that agreement should be determined by the law of New York.

Contract Made in Foreign State—Freight Lost in Iowa—Application of Iowa Statute Declaring Such Contracts Void.—In *Hazel v. Chicago, etc., Ry. Co.*, 82 Iowa 477, 48 N. W. 926, 49 Am. & Eng. R. Cas. 76, an action against a railroad to recover the value of certain freight shipped over the company's road from a point in another state to a point in Iowa, but which was lost after coming into possession of the company in Iowa, it was held that it was competent for the company to show that the freight was received from plaintiff in the foreign state under a special contract limiting the liability of the company in case of loss or damage; and that such contract, being

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legal according to the laws of the state where it was made, will be enforced by the courts of Iowa, notwithstanding the provision of section 1308 of the Iowa Code of 1873, which in effect declares such contracts void and that the courts of Iowa will not give extraterritorial effect to such an act of a sister state.

*** Bill of Lading Drawn in Connecticut—Freight Shipped to Iowa—Destroyed by Fire in Illinois—Application of Iowa Statute.**—In *Talbot v. Merchants' Despatch Transp. Co.*, 41 Iowa 247, it appeared that a bill of lading, providing inter alia for exemption of the carrier from liability from losses by fire, was drawn in Hartford, Conn., where such exemption was lawful, and whence the merchandise was to be shipped, to Des Moines, Iowa, in which state carriers were not permitted to limit their liability. The goods were transported to Chicago, Ill., where they were destroyed by fire without fault on the part of the carrier. It was held that such exemption prevented the consignee from recovering.

Contract to Be Partly Performed in State Where Made.—In *Western & A. R. Co. v. The Exposition Cotton Mills*, 81 Ga. 522, 7 S. E. 916, 35 Am. & Eng. R. Cas. 602, it appeared that the contract in the bill of lading limited the liability of the carrier, by providing that it should not be held liable for "any loss or damage arising from * * * fire from any cause, on land or water, * * * freshets, floods, weather, * * * explosions, * * * insufficiency of package in strength or otherwise, rust, dampness," etc. It was held that while such a contract would not be binding in Georgia, it seems that under the laws of Massachusetts, it is a good contract in that state; and that it having been made in the latter state, and being intended to be partly performed there and in several other states, as well as in Georgia, the railroad can avail itself of such limitation of its liability.

Contract Made and to Be Partly Performed in Iowa—Application of Iowa Statute.—Where a railroad company undertook to transport freight from Clinton, Iowa, and deliver it in Chicago, it was held that the shipping contract, being entire, and made and to be partly performed in Iowa, must be governed by the laws of Iowa as to its validity, and, therefore, where such contract contained a condition limiting the liability of the company which, under chapter 112 of the Iowa Laws of 1866, was inoperative and of no effect, such restriction was void. *McDaniel v. Chicago & N. W. Ry. Co.*, 24 Iowa 412.

Limiting Liability to Own Line—Express Contract Required by Lex Loci—Bill of Lading Not Signed by Shipper.—A contract for the through carriage of goods from a point in Georgia to a point in another state was entered into in Georgia and the through bill of lading stated that the carrier's liability should cease upon delivery to the next connecting carrier, but under a statute of Georgia a carrier could not limit its liability except by express contract. It was held that the contract was governed by such statute as construed by the

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Supreme Court of Georgia, and, as the bill of lading was not signed by the shipper, the carrier's liability was not limited to its own line. *Central of Georgia Ry. Co. v. Kavanaugh* (C. C. A.), 92 Fed. Rep. 56, 13 Am. & Eng. R. Cas., N. S., 119.

Baggage—Condition of Steamship Ticket Valid in England, Where Bought—Application of Massachusetts's Laws.—In *Fonseca v. Cunard Steamship Co.*, 153 Mass. 553, 27 N. E. 665, it appeared that a ticket bought in England for an ocean passage, consisted of a large sheet of paper nearly covered on both sides with print and writing, with the printed heading on the face "Passengers' contract Ticket," and contained elaborate provisions for governing the conduct, rights, and liabilities of the parties until the ship reached the port of destination in Massachusetts, among other things exempting the carrier from liability for any loss of baggage arising from its negligence. It was held that the passenger in accepting and using the ticket, even if they did not read it, would be conclusively held to have assented to its terms, and that the stipulation, being valid in England, would be enforced in Massachusetts, although a similar contract made in such state would be void as against public policy.

Foreign Contract against Policy of Lex Fori.—In *O'Regan v. Cunard Steamship Co.*, 160 Mass. 356, 35 N. E. 1070, it is held that although a stipulation in a contract for carriage relieving the carrier from liability for injuries resulting from the negligence of its servants is against the policy of the law of Massachusetts, if valid in the country where it is made it will be enforced in Massachusetts.

Contract Made in Illinois to Transport into Kentucky—Destroyed by Fire in Illinois—Application of Kentucky Law.—In *Cleveland, etc., Ry. Co. v. Druen* (Ky.), 11 R. R. R. 447, 34 Am. & Eng. R. Cas., N. S., 447, 80 S. W. 778, it appeared that Ky. Const., § 195, declared that no carrier shall be permitted to contract for relief from its common-law liability; that a carrier contracted in Illinois to carry freight into Kentucky, and the contract relieved the carrier from liability for damages caused by fire not arising from its negligence, which limitation of common-law liability was valid under the laws of Illinois, and the freight, while in transit in Illinois, was destroyed by an accidental fire. It was held that in an action in Kentucky against the carrier for the destruction of the freight the limitation of liability was a good defense.

Application of Constitutional Provision—Right of Carrier Incorporated in Kentucky to Contract under Laws of Another State.—In *Tecumseh Mills v. Louisville & N. R. Co.*, 57 S. W. 9, 22 Ky. Law Rep. 264, it is held that Ky. Const., § 196, providing that no common carrier shall be permitted to contract for relief from its common-law liability, does not prohibit a carrier incorporated in Kentucky from contracting in another state for exemption from liability for loss by fire, where the goods are in that state, and are not even to pass through Kentucky.

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Contract on Face of Printed Form for Transportation of Horses, and on Its Back for Carriage of Custodian of Horses—Application of Stipulation on Back.—In *Brockway v. American Express Co.*, 171 Mass. 158, 50 N. E. 626, an action for negligence in the transportation of plaintiff's horses from a point in the state of Illinois, through several other states, to a point in Massachusetts, there was evidence that the contract was made in Illinois, on a printed blank form in general use by defendant express company, and which in terms exempted defendant from liability arising "from any fault, negligence, or carelessness, gross or otherwise, on the part of said company, its agents or servants." On the back of this contract was another for the transportation of a custodian of the horse, containing a stipulation that "any question arising under this contract shall be determined by the law of the state of New York," in which state the alleged act of negligence occurred. It was held that they were separate contracts, and the stipulation of the second above quoted did not apply to the first, or indicate an intention that it should be governed by the law of New York; that evidence of the validity under the law of the state of New York of the provisions of the first contract exempting the defendant from liability was properly excluded; and that the first contract was governed by *lex loci contractus*.

Construction of Contract—Lex Loci Contractus.—A written contract for the carriage of freight is to be interpreted according to the law of the place in which the contract was made. So held in *Fairchild v. Philadelphia, etc., R. Co.*, 148 Pa. St. 527, 24 Atl. 79.

Sufficiency of Assent Determined by Lex Loci Contractus.—In *Hartmann v. Louisville & N. R. Co.*, 39 Mo. App. 88, it is held that if a bill of lading be given in one state for the carriage of freight from a point in that state to a place in another state, and the *lex loci contractus* is that a provision, contained in the bill of lading and limiting the common-law liability of the carrier, is illegal, unless the shipper knew of and assented to such provision, and that the mere acceptance of the bill of lading is not, of itself, evidence of such consent, the sufficiency of the assent is a matter relating to the validity and effect of the contract, and is to be adjudged in a foreign tribunal in accordance with the law of the place of contract, and not the law of the forum.

Contrary to Public Policy under Lex Fori.—But a limitation of the liability of a common carrier contained in a shipping contract will not be recognized or enforced in Nebraska, though valid in the state where made, when such attempted restriction of liability is illegal and contrary to the public policy of the state of Nebraska. So held in *Chicago, etc., R. Co. v. Gardiner*, 51 Neb. 70, 70 N. W. 508.

Negligence—Contract Made outside State—Accident within State.—A stipulation in a contract for the carriage of a horse limiting liability in case of injury from negligence of the carrier to \$100, being against the policy of the state, will not be enforced, where the injury

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occurs within the state, though the contract is made outside the state, for carriage from a point without to a point within it, by connecting carriers. So held in *Hughes v. Pennsylvania R. Co.* (Pa.), 2 R. R. R. 925, 25 Am. & Eng. R. Cas., N. S., 925, 51 Atl. 990.

Same—Exemption Valid in England, but Void in United States—Express Agreement to Be Governed by Law of Flag.—In *Lewisohn v. National Steamship Co.* (D. C.), 56 Fed. Rep. 602, the defendant was held liable for damage to freight from its negligent stowage in a vessel, although the ship was English, and the bill of lading contained a stipulation, valid in England, exempting the carrier from the consequences of his negligence, and also provided that, in accepting it, the shipper expressly agreed that the contract should be governed by the law of the flag; the governing principle in this case being that contracts held void because against the policy of the United States cannot be made valid even by the express agreement of the parties. See also, *Monroe v. The Iowa* (D. C.), 50 Fed. Rep. 561.

Same—Passenger's Baggage.—A stipulation in a ticket, issued by an English steamship company to a passenger in the United States, for passage from an American to an English port, that the contract shall be governed by the English law, cannot render valid a condition purporting to exempt the company from liability for the negligence of its employees in respect to the passenger's baggage, as such a condition is contrary to the public policy of the United States. So held in *The New England* (D. C.), 110 Fed. Rep. 415.

Fire Clause—Contract Made in Tennessee Illegal in Texas—Legal Where Executed—Pleading and Proof.—A stipulation in a through bill of lading, purporting to exempt the carrier "from damages or loss by fire while in depot," made in Tennessee by a connecting railroad, being illegal in Texas, will not be passed upon in absence of allegation and proof that such limitation was legal where executed. So held in *International & G. N. R. Co. v. Moody*, 71 Tex. 614, 9 S. W. 465.

Assent to Contract Presumed under Lex Fori Only.—In *Hoadley v. Northern Transp. Co.*, 115 Mass. 304, it is held that if the law of the place where a contract, signed only by the carrier, is made for the transportation of freight, requires evidence other than the mere receipt by the shipper to show his assent to its terms, and the law of the place where the suit is brought presumes conclusively such assent from its acceptance without dissent, the question of assent is a question of evidence, and is to be determined by the law of the place where the suit is brought.

A. R. Y.

FENEFF v. BOSTON & M. R. R. et al.

(Supreme Judicial Court of Massachusetts, Worcester, Dec. 4, 1907.)

[82 N. E. Rep. 705.]

Master and Servant—Master's Liability for Injuries to Servant—Methods of Work—Rules.—Where, construing the rule directing engineers not to permit any person, except the fireman and others necessarily there in the discharge of their duty, to ride on an engine, in connection with the rules conferring on the yardmaster authority, not only over the yard itself, but over employees engaged therein in the train and yard service, it is manifest that, within the limits of the yard, the yardmaster's authority and right of supervision is not curtailed, a yard brakeman, riding on a passenger engine by the yardmaster's order to ride on any engine that might furnish the desired accommodation while going back and forth to his work, is not a mere licensee.

Same—Customary Violation.*—That for at least 15 years it had been customary for yard employees to ride on any engine that might furnish the desired accommodation in going to or returning from their work warrants an inference that, to that extent, a rule directing engineers not to permit any person except the fireman and others necessarily there in the discharge of their duty to ride on the engine had been abrogated.

Same—Ways Used in Work.—A servant entering on his master's premises to begin work, or leaving them at its close, is not, during the time of his entrance or exit, while using the ways provided, a licensee, but is there by the invitation of the master.

Same—Actions for Injuries—Sufficiency of Evidence—Contributory Negligence.—Where, though a yard brakeman knew that a switch engine frequently used the track on which he was riding on a passenger engine, he testified from previous observation that before doing so it had waited until the passenger engine went by, and it appeared from his experience as a yard brakeman that he believed switch engines when running through the yard "had the least rights of any train or locomotive," the jury might find that he was not reasonably bound to anticipate that, without waiting, as usual, for the passing of the passenger engine then due, the switch engine would attempt to use the track.

*For the authorities in this series on the subject of the waiver of rules made for the guidance and protection of railroad employees, see foot-notes appended to *McCarthy v. Pennsylvania R. Co.* (N. Y.), 24 R. R. R. 684, 47 Am. & Eng. R. Cas., N. S., 684; foot-notes appended to *Huggins v. Southern Ry. Co.* (Ala.), 24 R. R. R. 518, 47 Am. & Eng. R. Cas., N. S., 518.

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Same—Assumption of Risk.†—A yard brakeman, in riding on a passenger locomotive in returning from his work, only assumes those risks either obvious or known to him.

Same—Liabilities for Injuries to Third Persons.—A master is answerable for injuries caused by his servant's carelessness while acting within the scope of his employment.

Same—Actions for Injuries—Sufficiency of Evidence.—Evidence in an action for injuries to a yard brakeman in a collision between a passenger engine on which he was riding and a switch engine held to warrant a finding that the operator gave the required signal and opened the switch, permitting the switch engine to enter on the track, when in the exercise of ordinary care he ought to have known that there was every reason to anticipate that the collision which followed might occur.

Same—Nature of Liability.—Where a yard brakeman's injuries, sustained in a collision between a passenger engine, on which he was riding, and a switch engine, arose solely from the concurrent negligence of two railroad companies, and, though there was no concerted action, yet their combined carelessness in the simultaneous performance of unconnected duties produced the injury, the railroad companies were jointly and severally liable.

Exceptions from Superior Court, Worcester County; William Cushing Wait, Judge.

Action by Antoine Feneff against the Boston & Maine Railroad and another for personal injuries. Verdict for defendants, and plaintiff excepts. Verdict set aside, and judgment ordered for plaintiff.

Clarence E. Tupper, for plaintiff.

Ralph A. Stewart and *Arthur J. Young*, for defendant New York Central & Hudson River Railroad Co.

Charles M. Thayer and *Alexander H. Bullock*, for defendant Boston & Maine R. R.

BRALEY, J. The defendants insist that at the time of the accident the plaintiff was either a mere licensee to whom they owed no duty except to refrain from wanton or willful injury to his person, or was guilty of contributory negligence. This defense is untenable. It was undisputed that as a yard brakeman in the employment of the New York, New Haven & Hartford Railroad Company, having completed his work for the day, he was in-

†For the authorities in this series on the subject of the general principles involved in the doctrine of assumption of risks by servants, see foot-notes appended to *Southern Ry. Co. v. McGowan* (Ala.), 25 R. R. R. 353, 48 Am. & Eng. R. Cas., N. S., 353; foot-notes appended to *Denver, etc., R. Co. v. Warring* (Colo.), 24 R. R. R. 531, 47 Am. & Eng. R. Cas., N. S., 531.

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jured while riding within the yard limits on one of its passenger locomotives, which he had boarded for the purpose of going to the Union Station on his way home. The rules of this road conferred upon the yardmaster authority not only over the yard itself, but over the employees when engaged therein in the train and yard service, and it was by his express order that the plaintiff had been directed to ride on any locomotive that might furnish the desired accommodation. The rule with which the plaintiff was familiar, and upon which the defendants largely rely, directing engineers not to permit any person except the fireman and others necessarily there in the discharge of their duty to ride on the engine without a pass from the general manager, must be read in connection with the rules relating to the powers of the yardmaster. When thus construed, it is manifest that within the limits of the yard, his general authority, and right of supervision had not been curtailed. It further could have been found from the testimony of the engineer that for 15 years at least it had been customary to furnish similar transportation for the convenience of yard employees. If this state of affairs prevailed, the jury could infer that to this extent the rule had been abrogated. *Sweetland v. Lynn & Boston R. R.*, 177 Mass. 574, 59 N. E. 443, 51 L. R. A. 783; *Boyle v. Columbian Fire Proofing Co.*, 182 Mass. 93, 98, 64 N. E. 726. It also is unnecessary to decide if the plaintiff had ceased to be a servant, and had become a passenger, as he was lawfully passing over the premises of his employer in its conveyance, which at the time had the exclusive use of the railroad. A servant entering upon his master's premises to begin the day's work, or upon leaving them at its close is not during the time of his entrance, or exit, while using the ways provided, a licensee, but is there by the invitation of the master. The defendants accordingly owed to him the duty, to refrain from acts of negligence which might cause personal injury while he was making his egress in the usual way. *Olsen v. Andress*, 168 Mass. 261, 47 N. E. 90; *Boyle v. Columbian Fire Proofing Co.*, 182 Mass. 93, 102, 64 N. E. 726; *Holmes v. Drew*, 151 Mass. 578, 580, 25 N. E. 22. In the uncertain light of the early morning, clouded with mist, a view of the track, and the signals at Washington street, were somewhat obscured from the cab where the plaintiff stood. While he knew that the switching engine frequently used this track, he testified, from previous observation, that before doing so, it had waited at the signal tower until the passenger engine went by. It further appears from his experience as a yard brakeman that he believed such engines when running through the yard "had the least rights of any train or locomotive." Under the circumstances, it was open to the jury to find, that the plaintiff was not reasonably bound to anticipate that without waiting as usual for the passing of the

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regular engine which then was due, the switching engine would attempt to use the track. If it be said that he assumed the risk attendant upon the time and mode of transportation, the assumption included only those risks which either were obvious or known to him. It cannot be ruled as matter of law, that the possibility of the attempted use of a single track at the same time by another locomotive approaching from an opposite direction the engine where he was riding, and which had the right of way, either was obvious or should have been anticipated. *Wagner v. Boston Elevated Ry. Co.*, 188 Mass. 437, 441, 74 N. E. 919; *Urquhardt v. Smith-Anthony Co.*, 192 Mass. 257, 78 N. E. 410.

The defendants further urge that the engineer was not only careless, but his carelessness is to be imputed to the plaintiff. But without further comment, as the jury could find that in entering, and remaining in the cab, he acted with reasonable caution, so they could find that he possessed no knowledge which reasonably should have led him to anticipate negligence on the part of the engineer. *Shultz v. Old Colony St. Ry. Co.*, 193 Mass. 309, 79 N. E. 873, 8 L. R. A. (N. S.) 597. If, however, the impending collision was due in part to the engineer's fault, yet the impact of the engines followed so closely upon the discovery that it was unavoidable that it became an issue of fact whether the plaintiff, suddenly called on to face an emergency, could have taken any further steps for his safety. *Shultz v. Old Colony St. Ry. Co.*, *ubi supra*. Besides, if the engineer was believed, he had the absolute right to a clear track beyond the point where the accident happened, and while taking every proper precaution, owing to the darkness he neither saw nor heard the switching engine, which displayed no light and gave no warning of its approach, until it was so near that the immediate application of the emergency brake failed to prevent the collision. If he were found to have used reasonable diligence the question of imputed negligence did not arise.

But if the issues of the plaintiff's right of recovery and of due care were for the jury, the defendants deny that there was any evidence of their negligence. It is to be inferred that the group of tracks within the yard was either owned or controlled by the various corporations described in the exceptions, but the arrangement whereby the New York Central & Hudson River Railroad Company maintained a signal tower from which the movements of all trains and locomotives were indicated and regulated, or the Boston & Maine Railroad was conditionally permitted to use the main line of the New York, New Haven & Hartford Railroad Company, is not stated. If not fully conceded by the plaintiff, at least it must be assumed upon the record, that such use was authorized, and it was unquestioned that the signals from the tower were designed for the information and guidance

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of the employees of whichever company might be using the several tracks. The switching engine could not pass to the main line unless the signal was given, and the switch set by the operator in the tower. If the engineer of this engine relied upon the signal as indicating that the track was clear to the south station, still from the evidence of the witness Studley it was apparent that he then knew, or in the exercise of reasonable care should have known, not only that the passenger engine had not made its trip to the union station, but was due to pass over the same track at any moment.

In brief, upon all the evidence, a jury would have been warranted in finding, that although under the system the usual signal had been given, the switching engine was being run on the time of another locomotive, by the engineer, who was willing to take the chance, without any reasonable expectation of safely making the transit. See *Barry v. Boston Elev. Ry. Co.*, 194 Mass. 265, 80 N. E. 225. If its servant was careless while acting within the scope of his employment, the defendant railroad is answerable to the plaintiff for injuries caused by his negligence.

There also was evidence of the negligence of the remaining defendant. The night operator who was in charge of the tower, at the time of the accident did not testify. But from the evidence of the day operator, it appears that time-tables of all trains, with the contents of which, as well as of their movements, the operator must be familiar properly to display the signals, and operate the switches, were kept in the tower. It further was shown that the switchman's shanty at the grade crossing near the South Station having been connected by telephone, the operators being in doubt as to the coming of the passenger engine, on several occasions telephoned to ascertain if it were on its way, before the switching engine was allowed to use the track. It also was uncontroverted that the switching engine, whose movements were subordinate to regular trains, ran only at intervals when in the judgment of the men at the tower the main track was free. If these facts were found, then the operator on duty, who was the defendant's servant, with knowledge that the passenger engine had not passed, but momentarily might be expected, without taking the precaution to make any inquiry by telephone, gave the required signal, and opened the switch, thus permitting the switching engine to enter upon the main line, when in the exercise of ordinary care he ought to have known there was every reason to anticipate that the collision which followed might occur. *Doe v. Boston & Worcester St. Ry. Co.*, 194 Mass. —, 80 N. E. 814.

In avoidance of this liability the defendant urges, that two or more wrongdoers cannot be held jointly, unless either in fact, or by intendment of law, they co-operate in the perpetration of

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the wrong, as otherwise there would be a misjoinder of separate causes of action. Undoubtedly this is the general rule where two or more persons voluntarily unite in the act which constitutes the wrong, or the act is committed under such circumstances that they may be reasonably charged with intending the injurious consequences which follow. We refer only to a few illustrative cases. *Brown v. Perkins*, 1 Allen, 89; *Stone v. Dickinson*, 5 Allen, 29, 81 Am. Dec. 727; *Barden v. Felch*, 109 Mass. 154; *Levi v. Brooks*, 121 Mass. 501; *Bath v. Metcalf*, 145 Mass. 274, 276, 14 N. E. 133, 1 Am. St. Rep. 455; *Martin v. Golden*, 180 Mass. 549, 62 N. E. 977; *Parsons v. Winchell*, 5 Cush. 592, 52 Am. Dec. 745; *Hawkesworth v. Thompson*, 98 Mass. 77, 93 Am. Dec. 137; *Banfield v. Whipple*, 10 Allen, 27, 87 Am. Dec. 618; *Mulchey v. Methodist Religious Society*, 125 Mass. 487, 489; *White v. Sawyer*, 16 Gray, 586, 589; *Purvear v. Kimball*, 8 Allen, 199, 200; *Swain v. Tenn. Copper Co.*, 111 Tenn. 430, 78 S. W. 93; *Hill v. Goodchild*, 5 Burr. 2790. It has been said by an eminent legal author that "in respect to negligent injuries there is considerable difference of opinion as to what constitutes joint liability. No comprehensive general rule can be formulated which will harmonize all the authorities." 1 Cooley on Torts (3d Ed.) 246. See Pollock on Torts (7th Ed.) 194. But whatever diversity of opinion there may be elsewhere, the law here must be considered as settled, that if two or more wrongdoers negligently contribute to the personal injury of another by their several acts, which operate concurrently, so that in effect the damages suffered are rendered inseparable, they are jointly and severally liable. *Boston & Albany R. R. Co. v. Shanly*, 107 Mass. 568, 579; *Bryant v. Bigelow Carpet Co.*, 131 Mass. 491, 503; *Corey v. Havener*, 182 Mass. 250, 65 N. E. 69; *Oughlihan v. Butler*, 189 Mass. 287, 293, 75 N. E. 726; *Flynn v. Butler*, 189 Mass. 377, 75 N. E. 730. A corresponding liability under similar conditions has been sustained in other jurisdictions. *Colegrove v. N. Y., N. H. & H. R. R. Co.*, 20 N. Y. 492, 75 Am. Dec. 418; *Barrett v. Third Avenue R. R. Co.*, 45 N. Y. 628, 631; *Lynch v. Elektron Mfg. Co.*, 94 App. Div. 408, 88 N. Y. Supp. 70; *Tompkins v. Clay St. Ry. Co.*, 66 Cal. 163, 4 Pac. 1165; *Cuddy v. Horn*, 46 Mich. 596, 10 N. W. 32, 41 Am. Rep. 178; *Matthews v. Delaware & Hudson St. Ry. Co.*, 56 N. J. Law, 34, 27 Atl. 919, 22 L. R. A. 261; *United Electric Ry. Co. v. Shelton*, 89 Tenn. 423, 14 S. W. 863; *Wilder v. Stanley*, 65 Vt. 145, 26 Atl. 189, 20 L. R. A. 479; *McClellan v. St. Paul, Minneapolis & Manitoba R. R. Co.*, 58 Minn. 104, 59 N. W. 978; *Allison v. Hobbs*, 96 Me. 26, 28, 29, 51 Atl. 245; *Wabash, St. Louis & Pittsburg Ry. Co. v. Shacklet*, 105 Ill. 364, 44 Am. Rep. 791. The cases of *Parsons v. Winchell*, 5 Cush. 592, 52 Am. Dec. 745; *Mulchey v. Methodist Religious Society*, 125 Mass. 487, *Harriott v. Plimp-*

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ton, 166 Mass. 585, 44 N. E. 992, *Mooney v. Edison Electric Illuminating Co.*, 185 Mass. 547, 70 N. E. 933, and *Fletcher v. Boston & Maine R. R.*, 187 Mass. 463, 73 N. E. 552, 105 Am. St. Rep. 414, upon which the defendant relies as establishing a different rule, are to be distinguished. The first two decided that a master cannot be held responsible jointly with his servant, nor a principal with his agent; for a tort committed by the servant or agent, when acting within the scope of their employment. In the third case, the joint action failed because no proof appeared of any co-operation between the defendants to procure a breach of the plaintiff's contract of marriage, while in the fourth, the measure of damages, as well as the degree of liability being different, and distinct, the liability was said to be several. If in the remaining case, it could have been said that the accident was chargeable solely to the railroad company, upon whom primarily rested the contractual duty of safely transporting the plaintiff, and whose breach of this duty was the proximate cause of the injury, yet the decision in favor of the defendants well might rest, as the opinion states, upon his contributory negligence. In the present case the wrongful act was unintentional, and arose solely from the concurrent negligence of the defendants, and while it cannot be said that there was any concerted action, yet their combined carelessness in the simultaneous performance of unconnected duties, produced a single injury to the plaintiff. It thus becomes impossible to ascertain whether one defendant, more than the other, was the efficient cause of the wrong to which each contributed.

The plaintiff, therefore, is entitled to prosecute his suit to final judgment against both defendants, although he can have but one satisfaction in damages. *Ouglihan v. Butler*, 189 Mass. 287, 293, 75 N. E. 726, and cases cited.

The verdict in their favor having been improperly ordered, in accordance with the agreement of the parties, judgment is to be entered for the plaintiff in the sum of \$600.

So ordered.

CHICAGO & E. R. CO. v. LAWRENCE.

(Supreme Court of Indiana, Nov. 26, 1907.)

[82 N. E. Rep. 768.]

Master and Servant—Injuries to Servant—Contributory Negligence—Evidence.—In an action against a railroad company for the death of a switchman caught between an engine and a car which had been kicked onto a spur, evidence held insufficient to show the switchman's meaning in the use by him of the words "she will clear," applied to the car when it was placed on the spur, as bearing on the question of his contributory negligence in failing to discharge his duty of seeing that the car was placed so far in on the spur that trains on the principal track with their crews working and riding on them, could pass in safety.

Trial—Verdict—Special Interrogatories.—Where, in an action against a railroad company for the death of a switchman caught between an engine and a car kicked onto a spur, the question whether the car had been moved after the switchman placed the car on the spur was material and was controverted, a special interrogatory submitting the question whether a member of the crew, immediately after the car was placed and left standing on the spur, said to the switchman, referring to the car, "Will she clear?" and whether the switchman answered, "She will clear," was erroneous, because it assumed as a fact that the car, when it caused the switchman's injuries, was standing in the same spot it occupied when he announced it was "in the clear."

Same.—It is not error to overrule a motion for a more specific answer to a special interrogatory which should not have been given.

Evidence—Opinion Evidence—Conclusion of Witness.—In an action against a railroad company for the death of a switchman caught between an engine and a car kicked onto a spur, a question whether it was the duty of the switchman to determine, when a car was set on a spur, whether it was sufficiently in on the spur so that an engine might pass with safety to the crew, was objectionable, as calling for a conclusion of law or ultimate fact, since the duty to set the car in a particular manner to meet particular emergencies depended on the character of the employment and the rules thereof.

Same.—In an action against a railroad company for the death of a switchman, a question whether there were at the time of the accident any written rules of the company governing switchmen was properly excluded, as the rules should be exhibited, identified, and introduced, and their interpretation was not for the witness.

Same.—In an action against a railroad company for the death of a switchman caught between an engine and a car which had been

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kicked onto a spur, the question whether, if the switchman had been facing the west with his left hand holding the grabiron, with his lantern in his right hand, he could, by the light of the lantern, have seen the car on the spur, was improper, for the answer depended on the knowledge of the witness of the power of the lantern, the strength of the switchman's vision, the density of the darkness, etc.

Appeal—Harmless Error—Erroneous Exclusion of Evidence.—Error, if any, in excluding evidence subsequently admitted, is not prejudicial.

Master and Servant—Injury to Servant—Negligence.*—Where an action against a railroad company for the death of a switchman was founded on its negligence in disobeying a city ordinance, a rule of the company that persons in accepting employment assumed all risks was immaterial; the company having no power to relieve itself by contract from the effect of disobeying the ordinance, and a disobedience by it was not a hazard assumed by the switchman.

Same—Evidence.†—In such action a rule that the company desired its employees not to incur risk from which they could protect themselves, and enjoined on them to take time necessary to do their duty with safety to themselves, was properly excluded.

Same—Contributory Negligence—Weight and Sufficiency.—In an action against a railroad company for the death of a switchman caught between an engine and a car which had been kicked onto a spur, evidence held to authorize a finding of the switchman's freedom from contributory negligence.

On petition for rehearing. Overruled.

For former opinion, see 79 N. E. 363.

HADLEY, J. Guided by the points and arguments of appellant's counsel in their brief on petition for a rehearing, we have re-examined the questions involved in this case, and feel reassured that the conclusions we announced in the original opinion are correct.

Appellant's counsel, however, insist that certain questions arising under the motion for a new trial were not waived, and should be decided. The first relates to the court's action in overruling the appellant's motion to require the jury to make more definite

*For the authorities in this series on the subject of release or limitation by contract of master's liability for negligence, see extensive note, 3 R. R. R. 211, 26 Am. & Eng. R. Cas., N. S., 211; foot-notes appended to *Pittsburg, etc., Ry. Co. v. Ross* (Ind.), 23 R. R. R. 160, 46 Am. & Eng. R. Cas., N. S., 160.

†For the authorities in this series on the question whether railroad employees assume the risks from the violation of ordinances limiting the speed of trains or cars, see foot-notes appended to *Norfolk & W. Ry. Co. v. Gesswine* (C. C. A.), 20 R. R. R. 553, 43 Am. & Eng. R. Cas., N. S., 553; foot-notes appended to *Ives v. Wisconsin Cent. R. Co.* (Wis.), 20 R. R. R. 393, 43 Am. & Eng. R. Cas., N. S., 393.

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and direct answers to certain interrogatories submitted to it, and which it had attempted to answer. The motion was addressed to a half dozen or more interrogatories, but only three of the number, to wit, 40, 41, and 53, have been presented for review by a motion for a new trial. The interrogatories relate to the setting of a car of coal in upon a spur from the principal track. Lawrence, the decedent, was at the time the rear, or field, brakeman, and as such it was his duty to see that the car was placed on the siding at a distance from the frog that would clear the principal track. He had accompanied the car in onto the spur, and answered the inquiry of a fellow brakeman, "She will clear." The three interrogatories in the record are, in substance, as follows: "(53) Did Oscar Collins, a member of the same switching crew, immediately after the coal car was placed and left standing on the spur track (where it stood at the time Lawrence received his injuries), say to Lawrence, referring to the coal car, 'Will she clear?' and did Lawrence answer 'She will clear?' Ans. Collins made such inquiry and received an affirmative answer, but no evidence to show that the car was at the point where Lawrence received his injuries at the time he answered Collins." "(40) Did Lawrence, by the use of the words, 'She will clear,' mean that said car was standing in far enough on the spur track, so that all engines, with their crews working and riding on and about them, could pass and repass said car with safety to said crews and each member thereof? Ans. No evidence what he meant. (41) Q. If you answer the last question 'Yes,' did Lawrence exercise his own judgment in determining whether the car would clear? Ans. No evidence as to how he determined it."

With respect to No. 40, we do not see how it was possible for the jury to make a more positive answer. So far as appellant has pointed out, or we are able to discover, there was not a shadow of evidence before the jury that "in the clear," meant anything more than that the car was far enough in to enable a train on the main track to pass it without collision, or that it meant that it was far enough in to enable engines with their crews working or riding on or about them to pass and repass with safety to the crews. There was evidence to the effect that the company had no clearance posts at the place, and no written or printed rules relating to the setting of cars on sidings, and no rule defining what should constitute or be understood by the term setting a car "in the clear." The yardmaster, in testifying for the railroad company, in answer to the question, "What do you mean by 'in the clear?'" said: "I mean that the car should be in far enough to clear with safety all men working between the tracks. They should be in far enough for all the employees to ride back and forth with safety." The witness on cross-ex-

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amination was asked if he drew his conclusions as to the duties of the decedent, in relation to the setting of the coal car, from any written or printed rule of the company, and he answered, "No, sir; only from practical work." The yardmaster gave the jury, not what was generally meant by the decedent and other employees of the company by the words "in the clear," but what he meant as gathered from practical work, and not from any rules or definitions from the company. The evidence further shows that Lawrence had been working with that engine and switching crew, as field or rear brakeman, but three days, and there was not a particle of evidence before the jury to show that he had ever been instructed or informed as to how far a car should be placed from the passing track to be deemed in the clear, or to show whether he understood that a car would be "in the clear" when only far enough in to avoid collision with a passing train, or whether it should be far enough in to afford room and safety for employees between the car and a passing train. As to what he meant everything was in uncertainty. In this state of the evidence, it is plain that the jury could not have answered interrogatory No. 40 any more definitely that it did. Any different answer would necessarily have been founded on guesses and conjectures. And, as was said in a recent case, "verdicts must stand upon evidence, and not upon surmise or conjecture." *Railway Co. v. Miller*, 149 Ind. 490, 508, 49 N. E. 445.

Interrogatory No. 41 was to be answered only in the event the jury answered No. 40 in the affirmative, which it did not do. But, it may be said, with respect to the merits of the question, that every syllable that has been written concerning the absence of evidence relating to the fact inquired of in the preceding interrogatory may be applied with equal accuracy and force to No. 41.

Number 53 rests upon no sounder basis. In the first place, it artfully assumes as an established fact that the coal car when it caused Lawrence's injuries was standing in the same spot it occupied when he announced it was "in the clear." Whether the car had been moved after Lawrence placed it to the place where the injury occurred was a material and controverted fact relating to contributory negligence, and the court had no right to assume the fact to exist, one way or the other. The interrogatory should not have been submitted to the jury in the first instance, and it was not error to overrule the motion for a more specific answer. The only competent part of the interrogatory was fully and specifically answered. *Railway Co. v. Goddard*, 25 Ind. 185, 191. Appellant's counsel in the examination of one of appellee's witnesses, asked him the following question, which the court ruled, on appellee's objection, need not be answered: "Q. You may state if it was one of the duties of the rear switchman, at the

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time Lawrence was injured, to determine when a car was set in on a spur track, whether the car was sufficiently in on the spur track, so that an engine might pass with safety to the crew and all persons working or riding on the train." This question called for a conclusion of law or ultimate fact that was within the province of the jury, under proper instructions from the court, and not proper for the witness to draw. The duty to set the car in a particular manner to meet particular emergencies altogether depended on the character and limitations of the employment as the same may be defined and illustrated by the terms of the contract, and established rules and customs of the particular employment. It would have been proper to have inquired about what acts of service belonged to the position of field switchman, and which the decedent would have been held to have agreed to perform by his acceptance of the position, or to have introduced any pertinent rule of the company, or established custom with which he was acquainted, and from these subsidiary or evidentiary facts it was the province of the jury to determine the main, or ultimate, conclusion of duty. Men of equal qualification might differ as to whether it was the decedent's duty to set the car at a particular distance from track 72 under all the other facts and circumstances that surrounded him at the time, and the determination of such questions are generally for the jury. The question is well illustrated in the case of *Furniture Company v. Colvin*, 32 Ind. App. 398, 412, 69 N. E. 1032. For the same reasoning applied to a complaint, see *Pittsburgh, etc., Co. v. Lightheiser*, 163 Ind. 247, 251, 71 N. E. 218, 660; *Pittsburgh, etc., v. Peck*, 165 Ind. 537, 540, 76 N. E. 163. There are a number of other like questions relating to the duty of the decedent that are ruled by the same principle.

The further question was asked and refused. "Q. You may state whether or not it had been the custom and had been for a considerable time previous to this injury, for the defendant company in its Hammond yards to use railroad engines for switching purposes." The question was wholly immaterial and properly refused. A witness was asked whether or not there were, at the time of the accident, any written or printed rules of the company, governing the duties of field switchmen in the Hammond yards, concerning the placing of cars on switches leading off from the main track. The court refused the question, holding that the rules themselves should be first exhibited, identified, and introduced, and that their interpretation was not a matter for the witness. This was correct. During this witness' cross-examination the further question was asked and refused. "Q. If Lawrence had been facing the west, with his left hand holding the grabiron, with his lantern in his right hand, could he, by the light of the lantern, have seen the coal car?" An an-

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swer to the question must have depended upon the witness' knowledge of the power of the lantern, the strength of Lawrence's vision, the density of the darkness, etc., and, in the absence of such knowledge, the witness' answer must necessarily have been founded on surmise and conjecture, and was correctly refused. Besides, no harm could have resulted to appellant, for the witness proceeded to state the lantern's probable radius of light, and that there were no intervening objects between the engine and coal car.

The court also denied the introduction of the following rules of the company; "Rule 203 * * * All persons are notified that in accepting or retaining employment with the company, they thereby assume all risks incident to such employment, including the risks arising from the acts of co-employees." Rule 207, which was to the effect "that the company desired its employees not to incur risk from which they could protect themselves and enjoined upon them, to take, in all cases, the time necessary to do their duty with safety to themselves, and not subject themselves to unnecessary risks." With respect to the first, the rule is wholly immaterial since the action is founded on the negligence of the defendant in disobeying a city ordinance, against which the company had no power to relieve itself by contract, nor was it a hazard assumed by the decedent in his employment. The second is but an exhortation to care, and we do not see how it could aid the jury in determining the case upon its merits.

Finally, it is insisted that the verdict is not sustained by sufficient evidence. There is no dispute but the defendant was operating in its switchyard within the city of Hammond a locomotive, backward and forward, in the night time, without a headlight on the rear or outer end of the tender, in defiance of an ordinance forbidding it. This sufficiently established the negligence of the defendant. On a very dark night, while the locomotive was running backward without a headlight on the then forward end of the tender, the decedent, while climbing out of the cab of the engine to the ground in the discharge of duty, was caught and crushed between the engine cab and a coal car standing on a spur but 6½ inches from the passing locomotive. It is at least strongly probable, if the headlight had been on the forward end of the tender, where the ordinance provided it should be, the decedent would have seen the dangerous proximity of the car in time to have avoided it.

But it is earnestly urged by appellant's counsel that the evidence shows, without controversy, that the decedent, by his own carelessness and inattention to business, contributed to his own injury. There is no conflict in the evidence as to the following facts: The deceased was a mature man, possessed of all his faculties, and of ordinary judgment. He had been working as

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rear or field switchman, with the crew and locomotive with which he was engaged at the time of his injury for three days. The company had no written or printed rules defining the duties of field switchman in setting cars from a main track into a spur, or the distance such cars should be set in on the spur, or at what distance from the passing track should be deemed "in the clear." There was a custom prevailing in the yard at the time by which employees determined when a car was in the clear by placing one foot on the inner side of the nearest rail of the passing track and extending the arm and hand toward the standing car, and, if the car was not thereby touched by the finger tips, it was held to be "in the clear;" but there was no evidence that the decedent had knowledge of such custom, either actual or constructive. When the coal car was kicked in on the spur, Lawrence rode it in, and, when it stopped, he answered the inquiry of a fellow switchman that, "It will clear." The two switchman then returned to the train, which proceeded northward, passing by the standing car that had just been placed, the locomotive then headed to the north, and having a brilliantly burning headlight in front. The engineer was at his station on the right of the locomotive, and, when passing the car, was looking at an object on the right of the road, and did not see the car standing on the left. The fireman was also at his post on the left of the engine, and from the headlight on the head of the locomotive did see, as they passed, the car standing on the spur. In about five minutes the train returned southward to do some work on the spur track referred to. The locomotive was again backing, drawing some cars after it, and having no headlight on the then advancing end of the tender, but a signal lantern. When the train began its return southward, Lawrence got into the cab of the engine. When they had arrived in the vicinity of the spur intersection, Lawrence, with a signal lantern in his right hand, and facing outward and seizing the grabiron of the cab, with left hand, stepped out and down on to the step of the cab, and was there caught and crushed between the cab and the coal car, which at that moment was standing but 6½ inches from the cab of the engine. There were no lights or clearance posts near the place of injury and plenty of room on the spur to set the car in a place of safety.

It should be borne in mind that the burden of proving contributory negligence rested upon the defendant. To establish such fact appellant has but three facts to rely upon: (1) It was Lawrence's duty to set the car far enough in on the spur to be in a position of safety to passing trains on track 72. (2) Did he place it and announce that it would clear? (3) Within five minutes after placing it he was injured by the car by reason of its being in a dangerous proximity to track 72. These facts do not necessarily make out a case of contributory negligence. If

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the car had been safely set on the spur by the decedent, and had been moved by some force from a place of safety to a place of danger, without the knowledge or fault of the decedent, he was blameless. It must be presumed that he was blameless. The jury was justified in finding the general presumption strengthened by the facts that after the car had been set the train of cars, locomotives, and crew passed by it without any collision or interference, and without its being observed, in the brilliant headlight of the locomotive, by any one on the train, except by the fireman, who testified he saw the car as they passed, but he was not asked by either party where it was, or how near it was, to track 72. The evidence shows that the spur was on about the same level of track 72. There was no evidence whatever as to whether the wind was blowing, or whether other cars were being shifted on the spur, or that the coal car, when it caused the injury, was standing at the same place where it was left by the decedent. The defendant failed to ask the fireman how far away from the cab of the engine the car was standing as they passed it going north. The onus being upon the defendant to establish the decedent's negligence in setting the car, we are unable to say that the facts and circumstances described were not sufficient to justify the jury in its conclusion that contributory negligence was not made out.

Petition overruled.

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(Supreme Judicial Court of Maine, Dec. 18, 1907.)

[69 Atl. Rep. 266.]

Carriers—Who Are Employees.*—Where the assigned place of work of an employee of a street railroad company is at a distance from his home, he may, notwithstanding such employment, be a passenger with the rights of a passenger while riding in the cars of the company from his home to his assigned place of work.

Same—"Passenger."*—Such employee so situated is a passenger while riding on a regular street car of the company from his home to his assigned place of work, if he so rides of his own volition, and not by the direction of the company, and pays his fare in coupons for fare issued to him by the company as a part of his wages.

Same—Injuries to Passenger—Action—Declaration.†—In an action by a passenger against a street railroad company for injuries received through a derailment of the car, it is sufficient to allege generally that such derailment was caused by the negligence of the company or its servants without more particular specification.

(Official.)

Exceptions from Supreme Judicial Court, Cumberland County.

Action by James Herbert against the Portland Railroad Company. Demurrer to declaration overruled, and defendant excepts. Exceptions overruled.

Action on the case to recover damages for personal injuries sustained by the plaintiff caused by the alleged negligence of the defendant company while transporting the plaintiff on one of its street railroad cars.

The action was brought in the Supreme Judicial Court, Cumberland county, and was entered at the April term, 1906, of said court. At the same term the defendant filed a special demurrer to the declaration. At a subsequent term the demurrer was sustained, and the plaintiff was allowed to file an amended declaration. The defendant then filed a special demurrer to the amended declaration. Upon hearing, the amended declaration

*See foot-notes appended to *Chicago, etc., Co. v. O'Donnell* (Ill.), 17 R. R. R. 769, 40 Am. & Eng. R. Cas., N. S., 769.

†For the authorities in this series on the question whether it is necessary for plaintiff, in an action against a railroad company, to designate its employees claimed to be guilty of the negligence alleged, see foot-notes appended to *Anderson v. Missouri Pac. Ry. Co.* (Mo.), 20 R. R. R. 696, 43 Am. & Eng. R. Cas., N. S., 696; *Western Ry. v. Stone* (Ala.), 19 R. R. R. 835, 42 Am. & Eng. R. Cas., N. S., 835.

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was adjudged good, and the demurrer thereto overruled. The defendant then excepted.

The amended declaration was as follows:

"In a plea of the case, for that for a long time prior to the 28th day of June, A. D., 1905, and up to the date of this writ, the defendant corporation was the owner of and operated a certain railroad running from the city of Westbrook, in said county to the city of Portland, in said county, with numerous branches connecting with said railroad and running to other points in said county, and were and are a common carrier of passengers.

"That one of defendant's branch lines runs to Riverton, in said county, and connects with its line running between Westbrook and Portland at a place known as Highland Square, in said Portland. That the plaintiff lived at said Westbrook, and was employed by defendant as a laborer at said Portland. That on said 28th day of June he took one of defendant's cars at said Westbrook to be transported to Woodfords, a point in said Portland upon defendant's line beyond said Highland Square from said Westbrook. That he gave to the conductor in charge of said car a coupon ticket, which he had received from said defendant corporation, and for which he had paid a valuable consideration to said defendant, and which entitled him to a passage over said defendant road in said car from Westbrook to said Woodfords, whereby it became and was the duty of defendant to convey said plaintiff safely to his destination at said Woodfords without injury or damage to him.

"That while on said car and while being so conveyed, and while he was in the exercise of proper care, and without fault on his part, when said car arrived at said Highland Square, because of the carelessness and negligence of said defendant corporation, and because of the unsound condition of its tracks over which said car was operated, said car in which said plaintiff was then traveling was suddenly and violently derailed, and came to a very sudden stop, and said car was derailed as aforesaid by reason of a defect in the ways, works, and machinery of defendant which arose from or had not been discovered or remedied owing to the neglect or want of care of some person in the employ of said defendant, and intrusted by it with the duty of seeing that the ways, works, and machinery were in proper condition, and that plaintiff had no knowledge of the dangerous condition of the ways, works, and machinery of defendant. And the plaintiff was thereby violently and with great force thrown from said car, and was thereby seriously injured, receiving serious and dangerous bruises to his back, limbs, and to other parts of his body; and was thereby severely wrenched, strained, and injured internally, and received serious injuries to his spine.

"That, by reason of said injuries, plaintiff was wholly disabled

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from all manual labor, and said disabilities have continued until the present time and said injuries are permanent. In consequence of said injuries plaintiff has suffered great pain both of body and mind, and has been put to great expense for the necessary medical attendance and medicine.

"And plaintiff avers that said injuries were caused wholly by the carelessness and negligence of said defendant, and without fault on his part.

"Second Count.

"For a long time prior to the 28th day of June, A. D. 1905, and up to the date of this writ, the defendant corporation was the owner of and operated a certain street railroad, running from the city of Westbrook, in said county, to the city of Portland, in said county, with numerous branches connecting with said railroad and running to other points in said county, and were and are a common carrier of passengers. That plaintiff had for some years prior to the said 28th day of June been employed by said defendant as a greaser, and that some months prior to said 28th day of June, his work being then on a branch of said defendant's line running from Woodfords in said Portland through Morrills Corner, in said Portland, he traveled over defendant's line from said Westbrook to said Woodfords, paying his fare in cash, at which time he notified defendant that the expense of his transportation to his work was so great that he could not afford to work for said defendant at the wages he was then receiving. That thereupon defendant promised and agreed with plaintiff, if he would continue in its employ at the same place at the same rate of wages, it would furnish him transportation from said Westbrook to said Woodfords, and, in consideration of said increase in pay by the addition of transportation, plaintiff entered into such agreement with defendant, whereupon, and as a part consideration for his continuing in its employ, the defendant issued and delivered to plaintiff a book of coupons, each coupon entitling him to a passage on defendant's cars between Westbrook and Woodfords. That on said 28th day of June, A. D. 1905, plaintiff took defendant's car at Westbrook to be transported on said car to Woodfords, and, on entering said car, he gave to the conductor in charge of said car one of said coupons, and which entitled him to a passage over defendant's road in said car from said Westbrook to said Woodfords, whereby it became and was the duty of said defendant to convey the plaintiff safely to his destination at said Woodfords without injury or damage to him.

"That while on said car, and while being so conveyed, and while he was in the exercise of proper care and without fault on his part, when said car arrived at said Highland Square, because of the carelessness and negligence of said defendant, because of

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the unsound condition of the tracks over which said car was operated, said car in which said plaintiff was traveling was suddenly and violently derailed, and came to a very sudden stop, and caused the plaintiff to be violently and with great force thrown from said car, and he was thereby seriously injured, receiving serious and dangerous bruises to his back, limbs, and to other parts of his body, and was thereby seriously wrenched, strained, and injured internally, and received serious injuries to his spine.

"That, by reason of said injuries, plaintiff was wholly disabled from all manual labor, and said disabilities have continued till the present time, and said injuries are permanent. In consequence of said injuries plaintiff has suffered great pain both of body and mind, and has been put to great expense for necessary medical attendance and medicine.

"Plaintiff avers that said injuries were caused wholly by the carelessness and negligence of said defendant, and without fault on his part."

The special demurrer to the amended declaration alleged that the amended declaration was insufficient for the following reasons:

"First. Because the plaintiff in the first count of said declaration alleges that he was employed by the defendant, but does not allege in said count whether or not he was acting in the employ of defendant at the time of the alleged accident.

"Second. Because the first count of said declaration is uncertain, doubtful, ambiguous, and repugnant, and does not apprise the defendant in what capacity the plaintiff was on the car of defendant at the time of the alleged accident, whether as a servant of defendant, or as a passenger for hire, in that the plaintiff alleges in said count that he was in the employ of the defendant, and yet the plaintiff further alleges in said count that the defendant is a common carrier of passengers; that the plaintiff gave to the defendant's conductor a ticket for which said plaintiff had paid a valuable consideration; that said ticket entitled him to a passage over defendant's railroad for a specified distance, viz., from Westbrook to Woodfords; and that it thereby became defendant's duty to carry him safely to said Woodfords.

"Third. Because, in the first count of said declaration, the plaintiff does not allege or set forth facts sufficient to apprise the defendant at the time of the alleged accident, whether as servant of the defendant or as passenger for hire, or in some other capacity.

"Fourth. Because the legal duty of the defendant towards the plaintiff set forth in said first count is neither the duty of a common carrier to a passenger for hire nor that of a master to its servant, in that said count alleges that the plaintiff took passage

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upon the defendant's car, and that 'it became and was the duty of defendant to convey said plaintiff safely to his destination at said Woodfords without injury or damage to him.'

"Fifth. Because, in the first count of said declaration, the plaintiff alleges that he was injured because of the carelessness and negligence of the defendant, and because of the unsound condition of its tracks, and by reason of a defect in its ways, works, and machinery; and yet the plaintiff does not set forth or allege how or in what particular the defendant was careless or negligent, and how or in what particular said tracks were unsound, or said ways, works, and machinery were defective.

"Sixth. Because the plaintiff in the second count of said declaration alleges that he was employed by the defendant, but does not allege in said count whether or not he was acting in the employ of defendant at the time of the alleged accident.

"Seventh. Because the second count of said declaration is uncertain, doubtful, ambiguous, and repugnant, and does not apprise the defendant in what capacity the plaintiff was on the car of the defendant at the time of the alleged accident, whether as a servant of defendant, or as a passenger for hire, in that the plaintiff alleges in said count that he was in the employ of the defendant, and yet the plaintiff further alleges in said count that the defendant is a common carrier of passengers; that the plaintiff gave to the defendant's conductor a ticket for which said defendant had paid a valuable consideration; that said ticket entitled him to a passage over defendant's railroad for a specified distance, viz., from Westbrook to Woodfords; and that it thereby became defendant's duty to carry him safely to said Woodfords.

"Eighth. Because in the second count of said declaration the plaintiff does not allege or set forth facts sufficient to apprise the defendant in what capacity the plaintiff was on the car of the defendant at the time of the alleged accident, whether as servant of the defendant or as a passenger for hire, or in some other capacity.

"Ninth. Because the legal duty of the defendant toward the plaintiff set forth in said second count is neither the duty of a common carrier to a passenger for hire nor that of a master to its servant, in that said count alleges that the plaintiff took passage upon the defendant's car, and that 'it became and was the duty of defendant to convey said plaintiff safely to his destination at said Woodfords without injury or damage to him.'

"Tenth. Because, in the second count of said declaration, the plaintiff alleges that he was injured because of the carelessness and negligence of said defendant, and because of the unsound condition of its tracks; and yet the plaintiff does not set forth or allege how or in what particular the defendant was careless

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or negligent, and how or in what particular said tracks were unsound."

Argued before EMERY, C. J., and STROUT, PEABODY, CORNISH, and KING, JJ.

Frank P. Pride and John O. Winship, for plaintiff.
Libby, Robinson & Ives, for defendant.

EMERY, C. J. On exceptions to the overruling ~~a~~ demurrer to the declaration. The case stated in the declaration is substantially this: The defendant company was a common carrier of passengers, and as such was owning and operating a street railroad in Westbrook and Portland, and between the two cities. The plaintiff was in the employ of the company as a "greaser." He lived in Westbrook, but his assigned place of work was at a point in Portland. In addition to his cash wages, the company gave him tickets good for passage upon its railroad between his residence in Westbrook and his place of labor in Portland. One day the plaintiff boarded a regular street car of the defendant company at Westbrook for passage to his place of work in Portland, and for such passage gave up to the conductor one of the tickets given him by the company as above stated. While thus upon the car and himself in the exercise of due care, and before reaching his destination, he was injured by the sudden derailment of the car through the fault of the company in not maintaining its track, way, works, and machinery in safe condition.

The defendant company claims that the declaration is insufficient, in that it does not contain enough to show what was the relation between the parties and the consequent duty of the one to the other at the time of the injury. We think it clear, however, that upon the statements in the declaration the plaintiff at the time of his injury was a passenger with the rights of a passenger against a common carrier.

In a sense of course, in the popular sense of the term, the plaintiff was in the defendant's employ. There was between them a then existing contract, implied at least, by which he was to render certain services to the company from day to day; but his work, his then assigned post of duty, was in Portland, and not in Westbrook, where he boarded the car, nor upon the line of road between his residence and his place of work. It is to be assumed that he was to report each working day at a given hour at his assigned post of duty in Portland, and that during the working hours of each such day he was under the company's orders within the line of his employment. It is also to be assumed that outside those hours, and while going to and from his work, he was under his own direction. It is not a case where the railroad company directs a servant to proceed on its cars from one place to another in the prosecution of his work, nor

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is it a case where a servant of a railroad company is riding upon its cars in the prosecution of his work during hours of work. In the case stated the plaintiff selected his own means of transportation. It was no concern of the company how he got to his work, if he got there. In availing himself of the company's railroad to get to his work he was acting in his own interest and of his own volition. He was not working for the company in thus riding on its railroads. The company did not pay him for so riding. He paid the company for his ride.

True, the plaintiff paid his fare by a ticket given him by the company for that ride, but he paid for the ticket by his services. It was part of his wages and delivered to him as such. It could make no difference in his status as a passenger whether he paid his fare in cash or in tickets thus earned.

We find that several courts in other jurisdictions have held the contrary of our decision of this question. Some of these contrary decisions seem to be based upon the circumstances that the plaintiff was riding on his way to his work, and not riding home, or to his luncheon or elsewhere. We cannot see any difference in principle. He was as much his own man while riding to his work as in riding from it. So far as we can learn, however, the precise question here has never been decided by this court, and hence we are free to follow what we think the better reason. Moreover, our contention is supported by respectable authority. *Doyle v. Fitchburg R. R. Co.*, 162 Mass. 66, 37 N. E. 770, 25 L. R. A. 157, 44 Am. St. Rep. 335; *Id.*, 166 Mass. 492, 44 N. E. 611, 33 L. R. A. 844, 55 Am. St. Rep. 417; *Dickinson v. West End St. Ry. Co.*, 177 Mass. 365, 59 N. E. 60, 52 L. R. A. 326, 83 Am. St. Rep. 284; *L. & N. R. R. Co. v. Scott's Adm'r*, 108 Ky. 392, 56 S. W. 674, 50 L. R. A. 381; *Gillenwater v. M. & T. R. R. Co.*, 5 Ind. 339, 61 Am. Dec. 101; *N. Y., L. E. & W. R. R. Co. v. Burns*, 51 N. J. Law, 340, 17 Atl. 630; *O'Donnell v. Allegheny Valley R. R. Co.*, 59 Pa. 239, 98 Am. Dec. 336; *McNulty v. Penn. R. R. Co.*, 182 Pa. 479, 38 Atl. 524, 38 L. R. A. 376, 61 Am. St. Rep. 721.

But the defendant further claims that, even if the declaration does state a case of injury to a passenger, it does not set out with sufficient particularity wherein the defendant company was negligent, though it does charge that the injury resulted from a derailment of the car through the defendant company's negligence. In actions of this kind, where the relation between the parties is that of passenger and carrier, a general allegation of negligence on the part of the company is sufficient without particular specification. *Ware v. Gay*, 11 Pick. (Mass.) 106; *Clark v. C. B. & Q. R. R. Co.* (C. C.) 15 Fed. 588; *Lavis v. Wisconsin Cent. R. R. Co.*, 54 Ill. App. 636; *Breese v. Trenton R. R. Co.*, 52 N. J. Law, 250, 19 Atl. 204; *Gulf, C. & S. F. R.*

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R. Co. v. Smith, 74 Tex. 276, 11 S. W. 1104. It is not ordinarily within the power of the passenger to specify in what particular the carrier was negligent. Again, while the plaintiff passenger must allege and prove negligence of the carrier as the cause of his injury, he does allege and prove it in this case by alleging and proving (if he does prove it) the derailment of the car and his consequent hurt. The negligence of the company is to be presumed from that circumstance alone, and it will be for the company to rebut that presumption by showing that the derailment of the car did not result from any negligence on its part. "Cars can ordinarily be run with safety, and, when they are not, that fact itself is evidence of fault or defect somewhere, requiring an explanation. The maxim, '*Res ipsa loquitur*,' applies in such a case." *Stevens v. E. & N. A. R.*, 66 Me. 74. The general allegation of negligence in this declaration is sufficient.

It follows that the exceptions should be overruled. We have, of course, examined every case cited by the defendant, but those cited from our own reports will be found not applicable to a case like this, an action for an injury caused by the derailment of a street car to one riding in the car.

Exceptions overruled.

GREGG et al. v. NORTHERN PAC. RY. CO.

(Supreme Court of Washington, April 2, 1908.)

[94 Pac. Rep. 911.]

Appeal—Setting Aside Verdict—Grounds—Record.—Where the record on appeal from an order setting aside a verdict in an action for negligent death showed that the successful party presented an order which recited that the new trial was granted on the sole ground of error in refusing an instruction requested by the defeated party, and the court declined to sign such an order and made a general order, not stating any particular grounds, and the trial court in its decision stated that it erred in denying the requested instruction and felt compelled to grant a new trial, the record showed that a new trial was granted on points of law reviewable on appeal.

Railroads—Death of Pedestrian on Track—Negligence.—Where, in an action against a railroad company for the negligent death of a person struck by a train, the evidence showed acts of negligence occurring before the train struck decedent and acts of negligence occurring while decedent, still alive, was under the train, and the company was not liable for the first acts of negligence unless decedent was free from contributory negligence, the refusal to charge that decedent was negligent in going on the track without looking and

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listening for approaching trains, and that such negligence barred a recovery unless the company's servants after learning that decedent was in a position of peril failed to exercise diligence to prevent injuring him, was erroneous.

Negligence—Proof of Negligence.—In ascertaining the existence or nonexistence of negligence, the issue must be considered relative to all the circumstances of time, place, and person.

Same—Contributory Negligence—Question for Jury.—Contributory negligence is ordinarily a question for the jury, and a trial court should not withdraw the issue, unless, after giving the party the benefit of all controverted questions of fact and every reasonable inference drawn therefrom, it indisputably appears that contributory negligence existed, and was in whole or in part the proximate cause of the accident.

Carriers—Injury to Passenger—Use of Premises—Contributory Negligence.*—One possessing good eyesight and hearing, and familiar with the surroundings, stepped on a railroad track with a view of crossing the track to board a train. Before stepping on the track he did not stop, look, or listen for a train. Held, that he was guilty of contributory negligence as a matter of law, though it be assumed that he was a passenger and entitled to protection as such.

Same—Who Are Passengers.†—One intending to become a passenger had not within a reasonable time prior to the arrival of the train which he intended to take placed himself on the platform provided for the use of passengers. He attempted to cross the track with a view of reaching the platform, and was struck by a train. Held, that he was not a passenger.

Hadley, C. J., and Root, J., dissenting, and Rudkin and Fullerton, JJ., dissenting in part.

Appeal from Superior Court, Spokane County; Wm. A. Huneke, Judge.

Action by A. H. Gregg, administrator of Sarah May Wright, deceased, and another, against the Northern Pacific Railway Company. From an order granting a new trial after verdict for plaintiffs, they appeal. Affirmed.

*See second foot-note appended to *Atchison, etc., Ry. Co. v. McElroy* (Kan.), 25 R. R. R. 487, 48 Am. & Eng. R. Cas., N. S., 487, where all the authorities on the subject in this series preceding it are collected.

†For the authorities in this series on the question whether a person may be a passenger before he boards a train or street car of the carrier, see foot-notes appended to *Karr v. Milwaukee, etc., Co.* (Wis.), 25 R. R. R. 623, 48 Am. & Eng. R. Cas., N. S., 623; *Pincus v. Atlantic C. L. Ry. Co.* (N. Car.), 24 R. R. R. 112, 47 Am. & Eng. R. Cas., N. S., 112; *Clark v. Durham Traction Co.* (N. Car.), 24 R. R. R. 165, 47 Am. & Eng. R. Cas., N. S., 165.

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Robertson & Rosenhaupt, Fred Miller, and L. O. Whitsell,
for appellants.

Edward J. Cannon, for respondent.

Crow, J. Sarah May Wright and Florence May Wright, widow and infant daughter of William Wright, commenced this action to recover damages for his death, alleged to have been caused by negligent acts of the defendant Northern Pacific Railway Company. The opinion of this court on a former appeal (38 Wash. 64, 80 Pac. 197) contains a statement of the pleadings. After the cause was remanded, a second verdict in favor of the plaintiffs was set aside, and a new trial ordered. From the order granting the new trial, the plaintiffs have appealed.

The respondent's Burke branch of road, about 11 miles in length, occupies a mountain canyon in Idaho, extending up a 4 per cent. grade from Wallace to Burke. At Frisco, one of four intermediate stations, the railway platform was located on one side of the respondent's track, and on the other side was the Frisco boarding house fronting up the canyon towards Burke. The kitchen towards Wallace was only about eight feet from the track. Mr. Wright had come to Frisco a day or two before his death to take charge of this boarding house, with which it is not contended the respondent was connected. The railway platform intended for the use of passengers was without shelter; there being no station building or ticket office. Passengers received at Frisco paid fare on the train. Several electric arc lights in the immediate locality were shown to be burning. No witness positively testified that they were not burning. The upper end of the canyon is so narrow at Burke that the engine cannot be turned. It is there switched to the rear of the train, which returns to Wallace running downgrade by gravity, with tender, engine, and cars in the order mentioned. The engine ordinarily used was provided with two white lights commonly known as "headlights," one placed on the rear end of the tender for use in returning downgrade. On the evening of the accident this regular engine had been laid off for repairs, and another substituted, provided with two red lantern lights, one on each side of the rear end of the tender. Although the train ran downgrade by gravity, a full head of steam was maintained by the fireman and engineer for switching and other purposes. The appellants offered evidence, much of it disputed, which tended to show that on the evening of the accident the bell was not rung; that the engine was not puffing steam; that the train made but little noise; that the night was dark, and the weather somewhat inclement; that, according to the rules of the company, the two red lights on the tender indicated the rear end of a departing train; that they were also a sign of danger; and that they were dim, affording but little light. The undisputed evidence

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shows that on November 22, 1904, Mr. Wright intended to go to Wallace; that intending passengers frequently remained in the boarding house awaiting the coming of the train; that Wright and others who were there knew the train was coming; that some of them heard its approach; that he told one of the waiter girls who was also going to Wallace to hurry, or she would be left; that he passed through the kitchen, and down some steps; that, when he reached the lower step about eight feet from the track, he emerged from behind the building theretofore between him and the approaching train; that he walked in a diagonal direction toward the track, stepped between the rails, and was instantly struck by the train; that one Hoover saw him come from the kitchen and walk to the track; that the waiter girl who had followed him saw him step between the rails; and that the fireman who was keeping a lookout down the track saw him come from behind the boarding house about 12 or 15 feet ahead of the tender, and walk upon the track. Hoover and the fireman both testified that he walked diagonally to the track, and that he did not look or appear to listen. No other witnesses who saw him disputed this evidence. The testimony of Mr. Hoover, the fireman, and the waiter girl, considered together, shows that at least one of them saw him at every point of his progress, from the kitchen door to the center of the track, yet not one of them testified that he looked toward the approaching train; their only recollection being that he did not do so. In making this statement we are not unmindful of the fact that Mr. Hoover, on cross-examination, said: "Well, he might have looked out of the boarding house." Upon this remark, which is no recital of actual knowledge of the witness, but a surmise only, appellants predicate the contention that Mr. Wright did look. The fireman stated that, when he saw Mr. Wright, he immediately notified the engineer, who at once made an emergency application of air to the brake, or as he expressed it, "dynamited the train." On approaching Frisco, and before the fireman saw Mr. Wright, the engineer made a service application of air and slackened his speed to four or five miles an hour. The appellants introduced further evidence, also vigorously disputed, tending to show that, after the train first struck Mr. Wright, it continued downgrade for a distance of from 50 to 80 feet; that his clothing caught on the brake or brake beams; that he was thus pushed ahead of the train; that, when it stopped, he was on the track, held in front of the wheels; that he was alive and struggling to extricate himself, and that, before he was removed, the engineer negligently started the train, causing the wheels to pass over and instantly kill him. On the trial the appellants contended that the respondent was guilty of negligence in the first instance in noiselessly running its train downgrade on a dark night without any head-

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light, without ringing the bell, without giving any other signal, and in having the two red lights which indicated a receding rather than an approaching train; that it was thereafter negligent in wantonly running its train over Mr. Wright while he, still alive, was pinioned to the track under the wheels. The respondent denied negligence on its part, but contended that Mr. Wright was guilty of contributory negligence.

The trial judge announced his decision in a letter to the respective attorneys, in which he said: "At the conclusion of plaintiffs' case, defendant challenged the sufficiency of the evidence, and moved that the jury be discharged and the court direct what judgment should be entered, defendant relying upon the ground that plaintiffs' testimony showed that deceased had failed to exercise that care which the law requires of all persons who knowingly cross a railroad track. I stated in answer to defendant's argument on this motion that if that were all there was in the case that I should have no hesitancy in granting his motion, and then added that there was testimony showing another feature, namely, the backing of the train after deceased had been knocked down, which would have to go to the jury, for which reason the motion was denied. Defendant requested an instruction upon the same ground, but, as I had decided to send the case to the jury, I did not think at the time of the importance of this phase of the case, and hence sent the whole case to the jury. I regret now that I did not take time to consider the requests for instructions; for, if I had, I have no doubt that I should have taken from the jury the first phase of the case; i. e., that deceased received his first injury through his own want of care, and that defendant would not be liable therefor. In my judgment this is not a question of fact for the jury; but is a question of law for the court. There is no testimony whatever that I recall tending even remotely to show that deceased was in the exercise of due care as he was about to cross the track, but the testimony is all one way; that he knew that the train was coming and was near at hand; that he himself left the boarding house—only a few feet away—for the purpose of boarding that identical train; that he called to others present to hurry or they would miss the train; that he walked down the steps and stepped upon the track, and almost instantly was knocked down by the approaching train; that the train had at least two red lights displayed upon the end that was approaching him; and that the track was straight and entirely clear of obstruction. There is an allegation that the train was running at a high and dangerous rate of speed, but there is no testimony at all to support this allegation. There is no testimony, therefore, to show any negligence on the part of the defendant this far in the story of this accident, and under such state of the evidence

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it would not be right to permit that question to go to the jury in the face of a request on the part of defendant that it be taken from them. This was the principal ground relied upon for a new trial, and it will be granted upon this ground. If there were other grounds presented, I do not at this moment recall them, and they are not passed upon. * * * I am convinced that I erred in denying the request of defendant to instruct the jury as requested, and therefore feel compelled to grant the new trial." This letter has been included in the statement of facts and made a part of the record. The appellants presented an order which recited that the new trial was granted on the sole ground of error in refusing the instruction requested by respondent. This order the court declined to sign, presumably for the reason that it did not fully state the substance of his written opinion. A general order was entered not stating any particular grounds. With the record in this condition the respondent's attorney contended on the oral argument that it does not clearly appear that the motion for a new trial was granted on points of law which may now be reviewed on this appeal, excluding other grounds involving the discretion of the trial judge. The majority of this court, including the writer, think this contention cannot be sustained, but only two of such majority favor an affirmance of the order of the trial court. The writer, being of the opinion that only questions of law not involving any discretion are now before us for consideration, will announce his views in stating his reasons for affirming the judgment of the trial court.

The trial judge correctly indicated in his opinion that there were separate and distinct acts of negligence urged against respondent: (1) Those alleged to have occurred before the train struck Mr. Wright; and (2) those alleged to have occurred while he, still alive, was under the train. There was evidence which, although disputed, tended to show these separate acts of negligence. The issues as to whether the latter acts were proven and respondent's liability therefor were properly submitted to the jury. For the first mentioned acts the respondent could not be held liable unless Mr. Wright was free from negligence upon his part, which contributed to, or was the proximate cause of, the accident. The following is the instruction requested by the respondent: "I charge you that William Wright, the deceased, was guilty of negligence in going upon the railway tracks without looking and listening for approaching trains, and such negligence bars a recovery in this action, unless you find that the defendant railway company's servants, after learning that said deceased was in a position of great danger and peril, failed to exercise reasonable diligence and care to prevent injuring him." The trial judge in granting the new trial correctly held that it was prejudicial error to refuse this instruction.

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In ascertaining the existence or nonexistence of negligence, that issue must be considered relative to all the circumstances of time, place, and person. No two cases can be found in which the facts are identical. Contributory negligence is ordinarily a question to be passed upon and determined by the jury. A trial court should not withdraw such issue from their consideration, and hold a party guilty of contributory negligence as a matter of law, unless after giving such party the benefit of all controverted questions of fact, and every reasonable inference to be drawn therefrom and from conceded facts, it indisputably appears that such negligence did exist, and was in whole or in part the proximate cause of the accident. Bearing this rule in mind, we are compelled, upon consideration of the facts before us, to hold that the deceased was guilty of contributory negligence as a matter of law. The undisputed evidence shows that he was a man of 51 years of age, possessed of good eyesight, hearing, and bodily vigor; that he was familiar with the locality and its surroundings; that before he left the boarding house he knew the train he intended to take was coming; that he told others to hurry, or they would be left; that from the front of the boarding house one could see up the track several hundred feet; that he made his exit through the kitchen, where he could not look up the track until he was within eight feet of the nearest rail; that, in emerging from behind the building, he did not stop, look, or listen, but walked in a diagonal direction, looking from the train, until he stepped between the rails, and was instantly struck by the tender. How a man in possession of all his faculties could do these acts, and not be held guilty of contributory negligence as a matter of law, is beyond comprehension. *Woolf v. Washington R. & N. Co.*, 37 Wash. 491, 79 Pac. 997; *Baker v. Tacoma Eastern R. Co.*, 44 Wash. 575, 87 Pac. 826; *Anson v. Northern Pacific Ry. Co.*, 45 Wash. —, 87 Pac. 1058; *Railroad Company v. Houston*, 95 U. S. 697, 24 L. Ed. 542.

Appellants insist that the instruction requested by respondent was erroneous and properly refused, contending (1) that the deceased was a passenger to whom respondent owed the highest degree of care; and (2) that, being a passenger, he was entitled in going to the train to presume that he could do so with safety, and that, in view of such relation and conditions, it was for the jury to determine whether he was negligent in failing to stop and look or listen for the approaching train. It may be conceded that it is not always necessary for one to have actually boarded a train, or to have even purchased a ticket before becoming a passenger. The deceased could not purchase a ticket; there being no ticket office or agent at Frisco. Unquestionably, he intended to become a passenger, but did he occupy such an attitude relative to the respondent as to make him one? We hold

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that, under the facts shown, he did not. He had not within a reasonable time prior to the arrival of the train which he intended to have placed himself upon the platform provided for his use, so that he might be looked upon as a passenger and accepted as such by the respondent. In *Chicago & E. I. R. Co. v. Jennings*, 190 Ill. 378, 60 N. E. 818, 54 L. R. A. 827, the court said: "It is not necessary to create the relation that the passenger should have entered a train; but, if he is at the place provided for passengers, such as the waiting room or platform at the station, with the intention of taking passage, and has a ticket, he is entitled to all the rights and privileges of a passenger. A railroad company owes a general duty to receive and carry those who present themselves at the time and place provided for passengers requiring transportation. * * * When the passenger has presented himself at the proper place to be transported, his right to care and protection begins. *Cooley, Torts*, 653. But it is uniformly held that the passenger must have placed himself under the care of the railroad company, so that the circumstances will warrant an understanding on the part of the company that he is a passenger and under its care as such. * * * Since a railroad company owes the duty of protection to its passengers, it seems plain that the circumstances must be such that the company will understand that such a person is a passenger in its care, and entitled to its protection. The company certainly has a right to know that the relation and duty exist, and the passenger must be at some place provided by the company for passengers, or some place occupied or used by them in waiting for or getting on or off trains. Whenever a person goes into such a place with the intention of taking passage, he may fairly expect that the company will understand that he is a passenger, and protect him. If he could be a passenger before reaching such a place, there would be no limit or place where it could be said that he became a passenger. The intention of taking a train would only prove a purpose to enter into the contract relation, but would not create it. Any person walking towards a train on a public sidewalk might have no intention whatever of taking the train, but might have an intention to keep on along the street. So long as a person merely intends to be carried, but has not reached any place provided for passengers or used for their accommodation, he is not a passenger." See, also, 3 *Thompson, Commentaries on Law of Negligence*, § 2641; *Webster v. Fitchburg R. Co.*, 161 Mass. 298, 37 N. E. 165, 24 L. R. A. 521; *June v. Boston & A. R. Co.*, 153 Mass. 79, 26 N. E. 238; *Southern Railway Co. v. Smith*, 86 Fed. 292, 30 C. C. A. 58, 40 L. R. A. 746; *Fremont, etc., Co. v. Hagblad*, 72 Neb. 773, 101 N. W. 1033, 106 N. W. 1041, 4 L. R. A. (N. S.) 254.

But, assuming that Mr. Wright was a passenger, such relation

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would not release him from every obligation to care for his own safety, nor would it permit him to deliberately step in front of a moving train without being guilty of negligence. The appellants, in substance, contend that a passenger in going to or from his train may cross intervening tracks without looking or listening, and not be held guilty of contributory negligence as a matter of law; that, being a passenger, he is entitled to presume the railroad company has provided for his protection and safety from passing trains; and that, under such circumstances, the question of his negligence in failing to look or listen can only be determined by the jury. In support of this position they cite, with other cases, the following authorities: *Texas & Pac. Ry. Co. v. Gentry*, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186; *Illinois Central R. Co. v. Proctor*, 28 Ky. Law Rep. 598, 89 S. W. 714; *Betts v. Lehigh Valley R. Co.*, 191 Pa. 575, 43 Atl. 362, 45 L. R. A. 261; *Atlantic City R. Co. v. Goodin*, 45 L. R. A. 671; *Redhing v. Central R. Co.*, 68 N. J. Law, 641, 54 Atl. 431; *Atchison, T. & S. F. R. Co. v. Shean*, 18 Colo. 368, 33 Pac. 108, 20 L. R. A. 729; *Louisville, N. O. & T. Ry. Co. v. Hirsch*, 69 Miss. 126, 13 South. 244. These cases are not applicable to the facts before us. While in some of them passengers were injured and held not guilty of contributory negligence as a matter of law, it appeared that they were going to or from trains on which they intended to travel or had been traveling; that in doing so they crossed intervening tracks, for instance, between themselves and the station, and that they were struck by other trains passing on such intervening tracks. We have examined every case cited by appellants, and find that not one of them relates to a person who, not having presented himself at the company's platform or depot as a passenger, was injured by passing in front of the identical train upon which he intended to travel, doing so as it was approaching the station and arriving at its stopping place. Railroads cannot accept and transport travelers without providing moving trains which must approach and depart from stations where passengers are received. If an intending passenger who has not presented himself on the railway platform can pass directly in front of the identical train upon which he expects to travel, doing so as it arrives at a station, and not be guilty of contributory negligence, it would be difficult to understand what acts would constitute such negligence. Under the undisputed facts of this case we hold that the deceased was not a passenger, and that he was guilty of contributory negligence as a matter of law.

The order granting a new trial is affirmed.

MOUNT, J., concurs. HADLEY, C. J., and ROOT, J., dissent. DUNBAR, J., did not sit.

SOUTHERN RY. CO. *v.* NEWTON'S ADM'R.

(Supreme Court of Appeals of Virginia, March 12, 1908.)

[60 S. E. Rep. 625.]

Master and Servant—Injuries to Servant—Condition of Railroad Tracks.*—Where a brakeman was killed while in the performance of his duties in endeavoring to uncouple a car from a freight train, and the accident resulted from his stepping into a trench or excavation which had been dug along the track for the purpose of putting in target signals, the railway company was negligent, although it may have been dealing with an independent contractor for putting in such signals.

Same—Care Required.†—A railway company owes its servants the duty of ordinary care to protect them against danger from defective tracks.

Same—Evidence—Contributory Negligence.—In an action for the death of a brakeman while in defendant's employ, held, the evidence justified the finding that deceased was not guilty of contributory negligence.

Error from Circuit Court, Norfolk County.

Action by J. R. Newton, as administrator of R. H. Newton, deceased, against the Southern Railway Company. From a judgment for plaintiff, defendant brings error. Affirmed.

W. L. Williams and *Robert B. Tunstall*, for plaintiff in error.
Jeffries & Lawless and *E. P. Buford*, for defendant in error.

HARRISON, J. This writ of error is to a judgment in favor of the defendant in error in an action brought by him to recover of the plaintiff in error damages for having negligently caused the death of his intestate.

The record shows that the deceased, R. H. Newton, a young man 21 years of age, employed by the Southern Railway Company as brakeman, met his death on the 17th day of January, 1905, while endeavoring to uncouple a car from a freight train

*See extensive note, 24 R. R. R. 317, 47 Am. & Eng. R. Cas., N. S., 317.

†For the authorities in this series on the subject of the liabilities of railroad companies for injuries to their employees from unsafe tracks and roadbeds, see foot-notes appended to *Birmingham Traction Co. v. Reville* (Ala.), 9 R. R. R. 524, 32 Am. & Eng. R. Cas., N. S., 524, where all the preceding ones are collected; foot-notes appended to *St. Louis, etc., Ry. Co. v. Mize* (Ark.), 24 R. R. R. 501, 47 Am. & Eng. R. Cas., N. S., 501.

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owned and operated by the defendant company. The time of the accident was early in the morning, and the weather was "hazy, cloudy like, and foggy." The place of the accident was near Boone, a switching station in the county of Norfolk. While engaged in an attempt to work the handle bar of the brake rod for the purpose of detaching a car, the train was backing, and he running to keep up with it. Before he succeeded in uncoupling the car, he stepped into a trench or excavation, technically called a "lead out," which had been made a few days before, without his knowledge, immediately contiguous to the rails and cross-ties, and in the path he was required to traverse while performing his duty. The unexpected plunge into this excavation caused him to fall under the wheels of the moving train, where he was immediately crushed to death.

This excavation was 6 feet in length, running parallel with the rails. It was $4\frac{1}{2}$ feet wide, and $9\frac{1}{2}$ inches deep, and had piled around it the excavated dirt to the height of 12 inches above the surface level. It had been dug for the purpose of putting therein a dwarf, or target, signal as a part of an interlocking switch system, which was being installed by the Union Switch & Signal Company under a contract between it and the defendant railway company.

The chief contention of the plaintiff in error is that under the terms of this contract the Union Switch & Signal Company was an independent contractor, and that the railway company was, therefore, not responsible in this action.

The contract mentioned is in writing and filed with the record. It is plainly a joint contract, under which both parties agreed to perform certain parts of the work necessary to the installation of the contemplated "interlocking switch system." The railroad company assumed to do all track work, have all switches, derails, etc., ready to be connected, do all preliminary grading, and prepare the surface of the ground where the connections were to be run. Before the Union Switch Company began its work, the defendant was to do all blasting, to provide proper drainage, to provide space under the tracks for the "lead out" to cross, etc. The testimony of the foreman of the switch company, who was introduced by the plaintiff in error, shows that it was the duty of the railway company to dig the "lead out" or excavation complained of in this case, and to box it with lumber when completed. It is further shown by this witness that it was the custom to cover the "lead outs," or trenches, with boards when they are not filled up. This was not done in the case at bar.

The railway company certainly retained control of a large part of the work to be done under this contract, and whether under such circumstances the Union Switch Company can be said to be an independent contractor, in the legal sense of that term,

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may well be doubted. If, however, it be assumed that the Union Switch Company was an independent contractor, it would not, under the circumstances of this case, relieve the defendant from its duty to provide a reasonably safe place for its servants to work. It was not only the duty of the defendant, as shown, to dig the trench which caused the death of plaintiff's intestate, and to box it with lumber when completed, but the record shows that it knew, or by the exercise of ordinary care could have known, of the defect in the path of the deceased, and the increased danger to which its servants were thereby exposed, in ample time to have guarded them against it. The signal foreman of the defendant company testifies that it was his duty to inspect this work as it progressed, and that it was also the duty of the regular trackman to observe the conditions existing along its way and at its stations when these contracts were being carried out, as well as at other times.

The railway company was clearly negligent in this matter; and it is responsible for its own negligence and that of its agents and employees, although it may be at the time dealing with an independent contractor.

This question was involved in the case of *Va. Cent. R. Co. v. Sanger*, 15 Grat. 230. Judge Daniel, speaking for a unanimous court, in that case says: "In the view which I take of the case, the inquiry whether Brown and Chickard were contractors for the work in which they were engaged is not material; for if the company, by its officers charged with the duty of guarding the track against obstructions, saw or might by the exercise of proper vigilance have seen that Brown and Chickard were placing the stone in such close proximity to the track, or otherwise disposing of the material used in the work in a manner calculated to excite in the minds of cautious persons fears and apprehensions for the safety of the track, it was then its duty to use the utmost care and diligence to provide against the danger."

The difference of care due from the railroads in the two cases was one of degree only. In the case cited the plaintiff was a passenger, and the defendant owed him, as stated by the learned judge, the utmost care and diligence to provide against the danger. In the case at bar the plaintiff's intestate was a servant, and therefore the railway company owed him the duty of ordinary care to protect him against the danger.

The right of the plaintiff to recover in this case is denied upon the further ground that the deceased was guilty of contributory negligence. The basis of this contention is that the trench complained of was open and obvious, and that, if the deceased had used ordinary care and prudence in looking out for his own safety, he would have seen and avoided the danger.

The contributory negligence of the deceased was, under all

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the facts and circumstances of the case, a question for the jury. It was submitted to them under the following instruction, given at the request of the defendant company:

"The court instructs the jury that it was the duty of the deceased, R. H. Newton, while attending to his duties as brakeman, to use ordinary care and prudence in looking out for his own safety, and that if they believe from the evidence that the said R. H. Newton came to his death on account of stumbling in a trench dug for the interlocking signal plant, and further believe from the evidence that the said trench was open and obvious, and that the said Newton could have seen and avoided the same by using ordinary care and prudence, and that his failure so to do contributed to the accident, then the plaintiff would not be entitled to recover, and they should find their verdict for the defendant."

Early on a January morning, the weather being "foggy and hazy," the deceased was engaged in performing a duty devolved upon him by the defendant company. The undisputed evidence is that he was endeavoring to uncouple a car from a moving train, and that he was discharging that duty in the usual way. Under orders he was occupied with a duty which necessarily compelled the attention of his eyes and hands, and required him to run beside the moving train in the discharge of such duty. It is not contended that he had notice of the changed and unusual condition of the ground over which he was accustomed to pass, or that there had been any opportunity for him to learn of the change. The sole contention is that, the excavation being open and obvious, he should have seen and avoided it.

This court, in *Cheatwood's Case*, 103 Va. 356, 49 S. E. 489, cites with approval *S. & R. on Neg.* vol. 1, § 216, where the law on this point is stated as follows: "It may fairly be presumed that a servant knows the condition of materials, machinery, and appliances which he has a constant opportunity to inspect; but no such presumption arises where he has no such opportunity. A locomotive engineer, conductor, or train servant of any kind is not presumed to be familiar with the condition of the track; and therefore he does not as a matter of law assume risks arising from a defective or negligent construction of the track, or of the ties under the track, even though such defects existed when he entered upon his employment. And no servant is presumptively chargeable with other peculiar or unusual state of things. Reasonable time must be allowed a new servant to become acquainted with the surroundings, and an old servant to learn of changes in the situation. Servants are presumed to be aware of the defects which are perfectly obvious to their sight, and the danger of which is obvious to any person of their mental capacity. But, to charge them with notice on this ground, the defect

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and danger must be unquestionably plain and clear, so that, if they did not see it, they must necessarily have been in fault."

Applying this rule to the evidence in this case, the jury were well justified in finding that the plaintiff's intestate was not guilty of contributory negligence.

In disposing of the questions already discussed, we have sufficiently answered the objections taken to the action of the circuit court in giving and refusing instructions.

We are of opinion that the case was fairly submitted to the jury, and their verdict was properly allowed to stand.

The judgment complained of must be affirmed.

Affirmed.

NONN v. CHICAGO CITY RY. CO.

(Supreme Court of Illinois, Feb. 20, 1908.)

[83 N. E. Rep. 924.]

Negligence—Imputed Negligence—Driver and Passenger—Evidence.—In an action against a street railway company for injuries received by a person in a wagon which collided with a street car, evidence examined, and held to show that the driver of the wagon was in sole charge thereof, and that the person injured had no control whatever over the driver or the movement of the wagon.

Same.*—In order that the negligence of one person may be properly imputed to another, they must stand in such relation of privity that the maxim, "Qui facit per alium facit per se," directly applies.

Same.*—Where a person who while riding on a wagon the driver of which he had no control over was injured by a collision between the wagon and a street car without fault on his part, the negligence of the driver could not be imputed to him so as to defeat a recovery against the street railway company for injuries caused by the concurring negligence of the driver and the company.

Same—Fellow Servants—Application of Doctrine—Right of Stranger to Invoke.—The doctrine of contributory negligence on the part of a fellow servant cannot be invoked by a stranger against the injured party.

*For the authorities in this series on the subject of imputed negligence, see extensive note, 10 R. R. R. 110, 33 Am. & Eng. R. Cas., N. S., 110; foot-notes appended to *Shultz v. Old Colony St. Ry.* (Mass.), 25 R. R. R. 782, 48 Am. & Eng. R. Cas., N. S., 782; *Baker v. Norfolk & S. R. Co.* (N. Car.), 24 R. R. R. 760, 48 Am. & Eng. R. Cas., N. S., 760; foot-notes appended to *Thompson v. Pennsylvania R. Co.* (Pa.), 25 R. R. R. 695, 48 Am. & Eng. R. Cas., N. S., 695; *Cotton v. Willman & S. F. Ry. Co.* (Minn.), 25 R. R. R. 501, 48 Am. & Eng. R. Cas., N. S., 501; foot-notes appended to *Southern Ry. Co. v. King* (Ga.), 24 R. R. R. 785, 47 Am. & Eng. R. Cas., N. S., 785.

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Appeal—Review of Decisions of Intermediate Courts—Questions Reviewable—Questions of Fact.—All controverted questions of fact are settled by the judgment of the Appellate Court where such court approves a jury's verdict, and the only question of fact that can be considered in the Supreme Court is whether there is any evidence in the record fairly tending to support the verdict.

Appeal from Appellate Court, First District, on Appeal from Superior Court, Cook County; George A. Dupuy, Judge.

Action by Fred Nonn against the Chicago City Railway Company. From a judgment of the Appellate Court affirming a judgment for plaintiff, defendant appeals. Affirmed.

William J. Hynes and Watson J. Ferry, for appellant.

James C. McShane, for appellee.

CARTER, J. This appeal is prosecuted to reverse a judgment of the Appellate Court affirming that of the superior court of Cook county in favor of appellee and against appellant for \$1,500, recovered for personal injuries sustained by appellee as the result of a collision between one of appellant's street cars and a wagon in which appellee was riding.

The accident occurred at Yale avenue and Sixty-Third street, in the city of Chicago, about 6 o'clock in the evening of March 8, 1904. Sixty-Third street extends east and west, and Yale avenue runs into it from the south. A double-tracked street railway was controlled and operated by appellant along Sixty-Third street at this point; the cars being propelled by electricity. The north track was the west-bound and the south the east-bound track. At the time of the accident appellee was in the employ of Siegel, Cooper & Co., proprietors of a large department store, as an assistant to one Lepthien, who was driver of a large bulk delivery wagon of that establishment. The wagon was drawn by two horses and had a top over the body; the side curtains being then rolled up. At the time in question the wagon was being driven north along Yale avenue, on its homeward trip. As that street does not run north of Sixty-Third, the route of the wagon lay west in Sixty-Third street about 150 feet to Princeton avenue. As the wagon crossed the east-bound, or south, track, one of its hind wheels was struck and the wagon turned over by a car going east. Lepthien was sitting on the seat, driving. Appellee was back in the body of the wagon, but just the particular thing he was doing immediately prior to the accident is uncertain, for the reason that the driver was not noticing him, and appellee himself was rendered unconscious and remembered nothing until after he came to at the hospital. He testified that he did not see the car or know of its approach. The testimony tends to show, however, that he was getting the delivery ready for the next stop.

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Counsel for appellant contend that appellee was engaged with the driver as a fellow servant of a common master in a joint undertaking, and had the same authority to direct the conduct of the driver that the driver had to direct appellee's conduct, that both were upon an equal footing in that regard, and that, therefore, the negligence of the driver would be imputed to the appellee. The evidence in this record shows, without contradiction, that the driver, Lepthien, was in charge of the wagon. The driver positively testified to this, as well as the appellee. It is true the evidence is to the effect that the appellee, between the places of delivery, would look up where the next delivery was to be made and inform the driver, but it is manifest from this record that the driver was as much in control of the wagon and of appellee as if he had been the owner of the team and wagon in his own business. There has not been a scintilla of evidence pointed out which indicates that appellee could direct or control the movements of the wagon or the method of driving. The driver was in sole charge. This being the state of the record, we cannot agree with appellant's contention that the negligence of the driver, if any, would be imputed to appellee. Even if the negligence of the driver caused or contributed to the accident, it would not excuse appellant for an injury to one who was without fault or negligence. *Chicago & Alton Railroad Co. v. Vipond*, 212 Ill. 199, 72 N. E. 22. The case of *City of Joliet v. Seward*, 86 Ill. 402, 29 Am. Rep. 35, cited twice in appellant's brief, is considered and distinguished by this court in the *Vipond Case*, *supra*.

We held in *Chicago Union Traction Co. v. Leach*, 215 Ill. 184, 74 N. E. 119, that, if a street car company was guilty of negligence in running against a hired carriage in which plaintiff was riding, it was not relieved of liability because the driver of the carriage was also negligent. Appellant cites and relies upon this case, where the doctrine is stated that, if such an accident were solely attributable to the fact that the driver turned across the track when he was too near to enable the motorman to stop, there would be no negligence of the defendant and no liability. If the accident here in question was caused solely by the negligence of the driver, and the street car company was not guilty of any negligence, then appellant could not be held liable. But that is a question, under proper instructions, to be submitted to the jury, as it was in this case. There can be no such thing as imputable negligence, except in those cases where such a relation exists as that of master and servant or of principal and agent. In order that the negligence of one person may be properly imputed to another, they must stand in such relation of privity that the maxim, "*Qui facit per alium facit per se*," directly applies. *Union Pacific Railway Co. v. Lapsley*, 51 Fed.

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174, 2 C. C. A. 149, 16 L. R. A. 800; 7 Am. & Eng. Ency. of Law (2d Ed.) p. 448, note 2; *McKernan v. Detroit Citizens' Street Railway Co.*, 138 Mich. 519, 101 N. W. 812, 68 L. R. A. 347, and cases cited; *Marden v. Portsmouth, K. & Y. Street Railway Co.*, 100 Me. 41, 60 Atl. 530, 69 L. R. A. 300, 109 Am. St. Rep. 476. Whatever may be the doctrine of some of the earlier cases in other jurisdictions, not only our own recent decisions, but the great weight of authority, is to the effect that, where a person injured is without fault and has no authority over the driver of a private conveyance, the negligence of the latter cannot be imputed to the injured person so as to defeat the recovery against a third party for the concurring negligence of the driver and such third party.

The doctrine of contributory negligence on the part of a fellow servant cannot be invoked by a stranger against an injured party. The law is well settled that in such a case as to the stranger the rule of fellow servant does not apply. *Chicago & Alton Railroad Co. v. Raidy*, 203 Ill. 310, 67 N. E. 783, and cases cited. There is no evidence to indicate that the appellee was negligent in any manner, and the only claim is that the negligence of the driver, if any, must be imputed to him. Considering all the evidence, we cannot say that it necessarily leads to but one conclusion. The evidence as to whether the collision was caused by the negligence of appellant's employees was properly submitted to the jury, and on the record before us this court cannot interfere. *Chicago Union Traction Co. v. Jacobson*, 217 Ill. 404, 75 N. E. 508.

Appellant complains of the refusal of one instruction asked by it and the giving of an instruction asked on behalf of appellee on the question of the negligence of the driver being imputed to appellee. What has been said heretofore as to imputed negligence covers the points raised as to both these instructions. The court did not err in refusing the one or in giving the other instruction.

Counsel for appellant argue at length that only as great a degree of care must be exercised by the employees of a street railway company where one street stops at another street (as Yale does at Sixty-Third) as would be required in the center of a block, and not as great as at the intersection of two streets, as would have been the case had Yale extended both north and south of Sixty-Third street. It is not claimed that there was any error in the court's instructions or rulings on this point, but only that the street car of the appellant was entitled to the paramount right of way along Sixty-Third street in passing the north end of Yale avenue, the same as cars in the middle of the block, under the rule laid down in *North Chicago Electric Railway Co. v. Peuser*, 190 Ill. 67, 60 N. E. 78, and *West Chicago Street Rail-*

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road Co. *v.* Petters, 196 Ill. 298, 63 N. E. 662, and that this rule should have weight in deciding whose negligence caused this collision. All the evidence as to the negligence of the various parties was before the jury. In view of our holding on the other questions, we deem it unnecessary to consider or decide this one.

At a former term this case was submitted to this court on briefs. These briefs were stricken from the files on the ground that they were not in compliance with the rules, being an attempt to reargue controverted questions of fact decided by the Appellate Court. *Chicago City Railway Co. v. Nonn*, 229 Ill. 191, 82 N. E. 213. The present briefs of appellant are not entirely free from this fault, as they discuss a number of questions, with numerous citations of authorities, wherein the judgment of the Appellate Court is final and binding. This has caused unnecessary work in reaching a conclusion on the points that are properly reviewable here. The evidence as to the speed at which the car was approaching and at which the wagon attempted to cross the tracks, as well as the distance the car was away when the wagon reached Sixty-Third street, and as to how for the car moved after the accident, is sharply conflicting, and not strongly preponderating, if it preponderates at all, in favor of appellant. The comparative weight that should be given to the testimony of witnesses who testified as to the bell ringing or not ringing at the approach to the crossing, in view of the present record, cannot be considered by this court. By the terms of the statute all controverted questions of fact are settled by the judgment of the Appellate Court when it approves the verdict of the jury; and the only question of fact that can be considered here is whether there is any evidence in the record fairly tending to support the plaintiff's cause of action. *Chicago & Eastern Illinois Railroad Co. v. Snedaker*, 223 Ill. 395, 79 N. E. 169, and cases cited. This court in this case has nothing to do with the weight of the evidence. We would be greatly assisted in the disposition of cases if counsel would more carefully distinguish, in writing their briefs, as to the points that are fairly reviewable on appeal to this court.

Finding no error in the record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

JOHNSON *v.* UNION PAC. R. CO.

(Supreme Court of Rhode Island, March 27, 1908.)

[69 Atl. Rep. 298.]

Garnishment—Property Subject to Garnishment—Rights of Garnishee.*—A railroad company having in its possession within a state freight cars of a company whose lines of road are in other states, under an arrangement giving it the right to use such cars in its business in that and other states, until it should be convenient to return them loaded at some point on the owner's road, has such an interest in them and right to their use that it cannot be compelled to surrender them as garnishee in an action by foreign attachment against the owner in the state where they are found, or to return them to such state after their use elsewhere, and an attempted attachment by service of such garnishment does not give the court jurisdiction.

Same—Situs of Indebtedness—Consolidated Corporation.*—A railroad company was incorporated under the same name in three different states, and operated a line of road extending through all of them. The business was conducted as that of a single corporation having one set of directors and officers. Held that, whether regarded as a single corporation incorporated in three states or as three corporations practically consolidated by their stockholders, there was such practical unity that the situs of an indebtedness due to another company arising out of the operation of the road was, for the purposes of garnishment, in either one of the three states.

Commerce—Interstate Commerce—Indebtedness Arising Out of Interstate Commerce—Exemption from Garnishment.*—The fact that an indebtedness due to a nonresident railroad company arose out of the conducting of interstate commerce does not exempt it from garnishment under a foreign attachment.

Same—Freight Money Earned by Nonresident Initial Carrier on Interstate Shipment.*—Freight money in the hands of a final carrier belonging to a nonresident initial carrier is a mere debt, with no special character on account of being earned in interstate commerce, is subject to suit at law by the creditor road, if not paid, and is liable to garnishment as a simple contract or book indebtedness.

Action of tort by Amy S. Johnson against the Union Pacific Railroad Company commenced by foreign attachment by garnishing the New York, New Haven & Hartford Railroad Com-

*For the authorities in this series on the subject of the right to garnishee railroad companies or their agents, see foot-notes appended to *Cox v. Central Vermont R. Co.* (Mass.), 18 R. R. R. 432, 41 Am. & Eng. R. Cas., N. S., 432, where all those preceding it are collected; foot-notes appended to *Southern R. & G. Co. v. Northern Pac. Ry. Co.* (Ga.), 23 R. R. R. 529, 46 Am. & Eng. R. Cas., N. S., 529.

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pany. On motion to dismiss for want of jurisdiction, certain questions were certified to the Supreme Court under Court and Practice Act 1905, § 478. Questions answered.

Argued before DOUGLAS, C. J., and DUBOIS, BLODGETT, JOHNSON, and PARKHURST, JJ.

Alfred S. Johnson and Lewis A. Waterman, for plaintiff.
Gardner, Pirce & Thornley, for defendant.

PARKHURST, J. This cause is before the court upon a motion to dismiss for lack of jurisdiction, made upon a special appearance entered by the defendant for this purpose only. The motion came before the superior court for hearing, and as, in the opinion of that court, the questions of law arising on the motion were of such doubt and importance and so affected the merits of the controversy that they ought to be determined by the Supreme Court before further proceeding, the questions arising upon this motion were certified to this court under the provisions of section 478 of the Court and Practice Act of 1905. The action is one of tort arising out of an accident which occurred on the road of the defendant in the state of Kansas, and is brought by the plaintiff, Amy S. Johnson, against the defendant, the Union Pacific Railroad Company, a corporation organized under the laws of the state of Utah, and was commenced by process of foreign attachment under the provisions of section 524 of the Court and Practice Act of 1905 by service upon the New York, New Haven & Hartford Railroad Company, a Rhode Island corporation, as garnishee. Several services upon the garnishee were made before the substituted service by mail upon the defendant, and before the return day of the writ. No question is raised as to the form of the writ or as to the due and lawful service thereof upon the garnishee; the only questions being as to the sufficiency of the garnishment to give jurisdiction to the court growing out of the nature of the property sought to be garnished in this proceeding.

The garnishee, in due course, filed its affidavit (omitting the formal opening), as follows: "That the service of said writ upon said New York, New Haven & Hartford Railroad Company was made on the 21st day of July, 1905, and also upon the 1st day of August, 1905, and that at the time of said several services of said writ on said New York, New Haven & Hartford Railroad Company, there was in the hands and possession of said New York, New Haven & Hartford Railroad Company no personal estate of said defendant directly or indirectly except as herein stated; that said New York, New Haven & Hartford Railroad Company at the time of both said services had in its possession in the state of Rhode Island one freight car belonging to the defendant corporation and numbered 65,663; that both

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said New York, New Haven & Hartford Railroad Company and said Union Pacific Railroad Company, the defendant, are common carriers of goods by railroads, and were such at the time of the several services of said writ as aforesaid; that at the time of the services of said writ upon said New York, New Haven & Hartford Railroad Company, for a long time prior thereto, and ever since that time an arrangement and understanding has existed between the said defendant, the Union Pacific Railroad Company, and said New York, New Haven & Hartford Railroad Company, according to a custom universal in such cases among corporations operating lines of railroad throughout the United States in the management of their freight business, by which custom, instead of unloading and transferring freight from the cars of one company to the cars of another at the point of connection, each corporation receives the loaded cars of the other direct or from and through connecting lines, as the case may be, hauls them to their place of destination on its own line, and, after discharging the freight contained therein, returns them, as soon as and when practicable in the due course of business, reloaded with freight to some point on or near or reached by the line of railway of the company owning them; that, under the arrangement and understanding existing as aforesaid, the New York, New Haven & Hartford Railroad Company had the right to use in its business and for its own purposes the car aforesaid until such time as it might find it convenient and deem it proper to return the same, and the cars owned by said New York, New Haven & Hartford Railroad Company, while on the lines of the Union Pacific Railroad Company, were in like manner in current and constant use by the Union Pacific Railroad Company at all times, and that, in accordance with said understanding and agreement, the company owning any such car or cars is compensated for the wheelage or mileage thereof by the company in whose possession the same are; that the aforesaid method of receiving and returning railroad cars of other lines by railroads facilitates traffic, and is a great accommodation to the shipping public, and has become a part of the general system of freight transportation throughout the United States; that it would be practically impossible for the New York, New Haven & Hartford Railroad Company to carry on its business without an arrangement and understanding of this character with other lines of railroads, and that said New York, New Haven & Hartford Railroad Company, under the arrangement and understanding aforesaid, was at the time of the several services of the writ in this action upon it entitled to hold and use for its own purposes, as aforesaid, and for its business, said car of the Union Pacific Railroad Company then in its possession, free and discharged of and without interference from attachment or gar-

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nishment proceedings herein; and that the maintenance of said proceedings would nullify the rights of the garnishee to said car under the arrangement and understanding with the defendant hereinbefore mentioned, and interfere seriously with the proper movement of traffic and the accommodation of the shipping public; and that said car, at the time of the several services of said writ upon the New York, New Haven & Hartford Railroad Company, was used in commerce among and between the different states of the United States, and in accordance with the laws of the United States, whereby every railroad company in the United States whose road is operated by steam is authorized to carry upon and over its road freight and property on its way from one state to another state, and any interference therewith by attachment or garnishment proceedings would be in violation of section 8, art. 1, of the Constitution of the United States, which provides that Congress shall have power to regulate commerce among the several states. And I further on oath depose and say that the New York, New Haven & Hartford Railroad Company, in addition to its incorporation in Rhode Island as aforesaid, is incorporated by act of the Legislature of the state of Connecticut, in which state the corporation was first organized under that name, and the Legislature of the commonwealth of Massachusetts, and operates various lines of railway in the states of Connecticut, Massachusetts, Rhode Island, and New York, and that the corporations incorporated by all of said states are administered by one board of directors and by a single corporate organization, and that the principal office of said corporation is in the state of Connecticut, the first incorporating state; that at the time of the first service of said writ, as aforesaid, there was due and payable in the city of New Haven, in the state of Connecticut, from the various corporations known as New York, New Haven & Hartford Railroad Company, and organized and operating as aforesaid, to the Union Pacific Railroad Company, the defendant, the sum of eight hundred and four and 46-100 (\$804.46) dollars as a balance due on the accounts between said companies; and that, at the time of the service of the second writ as aforesaid, there was in like maner due from said New York, New Haven & Hartford Railroad Company to said Union Pacific Railroad Company the sum of nine hundred and nineteen and 91-100 (\$919.91) dollars; that the consideration for the charges by the Union Pacific Railroad Company against the New York, New Haven & Hartford Railroad Company, from which said balance accrued, was in part for the use by said New York, New Haven & Hartford Railroad Company of the cars of the Union Pacific Railroad Company, in accordance with the traffic arrangement and understanding hereinbefore referred to, in part for tickets sold by the New York, New Haven & Hartford Railroad

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Company upon some part of its system as aforesaid, the proceeds of which were payable to the Union Pacific Railroad Company, and in part for repairs made by the Union Pacific Railroad Company upon cars belonging to the New York, New Haven & Hartford Railroad Company; that all accounts out of which said balance grew were kept at said principal office of the New York, New Haven & Hartford Railroad Company in the city of New Haven, in the state of Connecticut, and that the balance so due was payable at said principal office in the city of New Haven, Conn.; that the situs of the said indebtedness from the New York, New Haven & Hartford Railroad Company to said Union Pacific Railroad Company, the defendant, was at its said main office in New Haven, Conn. I further on oath depose and say that it is impossible to state how much, if any, of said balance was due from said New York, New Haven & Hartford Railroad Company, the Rhode Island corporation, to said Union Pacific Railroad Company, or how much thereof was due to said Union Pacific Railroad Company from said corporation, or from any of said corporations for or by reason of the use of any of its cars in the state of Rhode Island, or for tickets sold as aforesaid within said state, and that such indebtedness, as the deponent is informed and verily believes, is not subject to attachment or garnishment in these proceedings." The motion to dismiss sets forth in substance that no valid attachment of property has been made, and no personal service, and that, therefore, the court has no jurisdiction to entertain this suit, either as a proceeding in rem or in personam.

Upon hearing had before the superior court the following questions were certified to this court for its determination, namely:

"(1) Is a freight car belonging to the defendant corporation, said corporation being organized and existing under the laws of the state of Utah and said car being in the possession of the New York, New Haven & Hartford Railroad Company, under the conditions set forth in the garnishee's affidavit filed by said last-named railroad company in this case, subject to attachment in a tort action brought by this plaintiff against said defendant corporation organized and existing as aforesaid under the laws of the state of Utah?

"(2) Are the moneys belonging to said defendant corporation, organized and existing under the laws of the state of Utah, in the hands and possession of said New York, New Haven & Hartford Railroad Company, and held by it under the conditions set forth in the affidavit of said last-named corporation filed in this case, subject to attachment and garnishment in a tort action brought by this plaintiff against said defendant corporation organized and existing as aforesaid under the laws of the state of Utah?"

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As to the first question, we are of the opinion that it must be answered in the negative. This same case was recently before the United States Circuit Court for the district of Rhode Island (145 Fed. 249) on precisely the same state of facts set forth in said affidavit, and in a careful and well-considered opinion Judge Brown of that court held as follows: "By the garnishee's affidavit it appears that, at the dates of several services upon it, it had in its possession certain freight cars belonging to the defendant, but that it held the same under an arrangement with the defendant whereby the New York, New Haven & Hartford Railroad Company has a right to use the cars in its own business until such time as it may find convenient and proper to return the same reloaded with freight to some point on or near or reached by the line of railway of the defendant. The defendant contends that the garnishee has such an immediate interest in the property, and such a right of use of the cars, that, when it has exercised this right, the cars will have reached the possession of the defendant in a foreign jurisdiction, and that it will be beyond the power of the garnishee to return the cars, or of the court to obtain a return. It is urged that the garnishee cannot be deprived of its right to use the property by reason of a controversy between other parties in which it has no interest—citing *Drake on Attachment* (3d Ed.) p. 462, as follows: 'It is an invariable rule that under no circumstances shall a garnishee, by the operation of proceedings against him, be placed in any worse condition than he would be in if the defendant's claim against him were enforced by the defendant himself—citing, also, *C. F. Wall v. Norfolk & Western Ry. Co.*, 52 W. Va. 485, 44 S. E. 294, 64 L. R. A. 501, 94 Am. St. Rep. 948; *Michigan Central R. R. Co. v. Chicago, Michigan & Lake Shore R. R. Co.*, 1 Ill. App. 399; *Connery v. Quincy, Omaha & Kansas City R. R. Co.*, 92 Minn. 20, 99 N. W. 365, 64 L. R. A. 624, 104 Am. St. Rep. 659. The plaintiff argues that in the case at bar there was no express agreement giving to the New York, New Haven & Hartford Railroad Company the right to use the cars; and it is objected that the defendant relies merely upon a custom, and that that custom is of the most vague and indefinite kind. It is contended that this is, in effect, merely a license or privilege to use cars for hire practically as it sees fit, and must yield to the greater right of a creditor and a resident of this state to attach the property. It is argued that the rule that the garnishee cannot be placed in a worse position by the attachment has its exceptions, and does not permit a garnishee to return the goods or articles attached, freed from the attachment, to the owner. The proposition that the plaintiff in trustee process cannot be placed in a better position than the principal defendant is recognized in *Waldron v. Wilcox*, 13 R. I. 518, 520; *Brown v. Collins*, 18 R. I.

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242, 27 Atl. 329; *Smith v. Millet*, 11 R. I. 528. It is difficult to see upon what principle the plaintiff can be allowed, by his attachment, to destroy the right of the New York, New Haven & Hartford Railroad Company to use these cars in the state of Rhode Island to load them with freight, and to transport them through or into other states. It is also quite clear that the burden of returning these cars from another state to the state of Rhode Island cannot be imposed upon the garnishee. The cases cited by the defendant are direct authorities for this position. It therefore becomes unnecessary to consider the general question of the right to make garnishment of rolling stock, or whether such garnishment would constitute an obstruction of or interference with interstate commerce. I am of the opinion that the jurisdiction of this court cannot be supported by virtue of the attempt to attach the defendant's cars in the possession of the garnishee." We are fully convinced by the reasoning above quoted, and believe it to be well supported by the authority of carefully considered cases, as cited in the opinion; nor do we find among the numerous cases cited upon the plaintiff's brief to this point any cases which are in serious conflict with the position herein taken. Such cases as the plaintiff cites sustaining the attachability of rolling stock of railway corporations relate solely to rolling stock belonging to the defendants in the cases cited, and directly attached in suits against the defendants, not being subject to any such right or interest on behalf of any garnishee as is shown in this case. The interstate commerce question was not raised. As it does not appear in the affidavit whether or not the freight car of the defendant was in actual use by the garnishee in the course of interstate commerce, or was idle, at the time of its attempted garnishment, we have not thought it necessary to decide the question whether or not the attachment of rolling stock under these circumstances is an interference with interstate commerce.

As to the second question, whether the moneys of the defendant corporation shown by the affidavit to be in the hands of the garnishee are subject to attachment and garnishment, we are equally in accord with the opinion of Judge Brown, above cited, and feel constrained to answer that question in the affirmative. This question involves two considerations, viz.: (1) Whether the moneys sought to be garnished were due from the Rhode Island corporation; and (2) whether such moneys arose from the operations of interstate commerce, and are so intimately connected therewith that the attachment of such moneys would be an interference with interstate commerce and so void as being in violation of the provisions of the Constitution of the United States in relation to interstate commerce. Upon both these points we feel that we can adopt the language of Judge Brown in the opinion already cited (145 Fed. 251 et seq.), as follows: "The

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next question is whether the plaintiff has succeeded in garnishing a debt due from the garnishee to the defendant. The garnishee makes oath that the New York, New Haven & Hartford Railroad Company, in addition to its incorporation in Rhode Island, is incorporated by act of the Legislature of the state of Connecticut, in which state the corporation was first organized under that name, and by the Legislature of the commonwealth of Massachusetts, and operates various lines of railway in Connecticut, Massachusetts, Rhode Island, and New York; that the corporations incorporated by all of said states are administered by one board of directors, and by a single corporate organization; that the principal office is in the state of Connecticut, the first incorporating state. The garnishee sets forth that at the times of various services upon it there were due and payable in the state of Connecticut, from the various corporations known as the New York, New Haven & Hartford Railroad Company, to the Union Pacific Railroad Company, certain sums as the balances due on accounts between the Union Pacific Railroad Company and the New York, New Haven & Hartford Railroad Company; that the consideration for the charges by the Union Pacific Railroad Company against the New York, New Haven & Hartford Railroad Company, from which said balances accrued, was in part for use by the New York, New Haven & Hartford Railroad Company of cars of the Union Pacific Railroad Company, in part for tickets sold by the New York, New Haven & Hartford Railroad Company upon some part of its system as aforesaid, the proceeds of which were payable to the Union Pacific Railroad Company, and in part for repairs made by the Union Pacific Railroad Company upon cars belonging to the New York, New Haven & Hartford Railroad Company; that all accounts out of which said balance grew were kept at the principal office of the New York, New Haven & Hartford Railroad Company in New Haven, in the state of Connecticut; that the balances due were payable at said principal office; that the situs of said indebtedness was at the main office in New Haven. The garnishee further swears that it is impossible to state how much, if any, of said balances was due from the Rhode Island corporation, or how much was due to said Union Pacific Railroad Company from said Rhode Island corporation or from any of said corporations for or by reason of the use of any of its cars in the state of Rhode Island, or for tickets sold as aforesaid within said state. It sufficiently appears from the garnishee's affidavit that the New York, New Haven & Hartford Railroad Company does business in three states under a single administration. It is the defendant's contention that the Rhode Island incorporating act of May 17, 1893 (Acts and Resolves, January Session 1893, p. 377), created an independent Rhode Island corporation; that it did not merely

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reincorporate a foreign corporation in this state; that consequently the Rhode Island corporation can be liable only for an unascertainable proportion of the balance due to the Union Pacific Railroad Company; and that this is a liability which it owes to the Connecticut corporation rather than to the Union Pacific Railroad Company directly. The status of the New York, New Haven & Hartford Railroad Company has been before the courts of this circuit. *Smith v. N. Y., N. H. & H. R. R. Co.* (C. C.) 96 Fed. 504; *Goodwin v. N. Y., N. H. & H. R. R. Co.* (C. C.) 124 Fed. 358. In these cases the questions related to citizenship. It does not seem necessary, however, to determine whether the Legislature of Rhode Island reincorporated in this state a pre-existing corporation of the state of Connecticut, or of Massachusetts, or created a new corporation of Rhode Island with the same name and powers within this state. Whether the garnishee is a single corporation incorporated within three states, or three corporations which practically have become so consolidated that their affairs cannot be separated, I am of the opinion that the situs of the indebtedness on the joint or consolidated business, for the purpose of garnishment, is in either state. The practical inconvenience of adopting any other view is so great that we should hesitate to confuse by judicial decision what the stockholders of the various corporations of the New York, New Haven & Hartford Railroad Company have seemed to regard as a very simple arrangement. In *Goodwin v. N. Y., N. H. & H. R. R. Co.* (C. C.) 124 Fed. 358, 370, Judge Lowell said: 'Whether the organization is deemed (1) a single corporation; (2) one corporation with several aspects; (3) several separate corporations of which only one is recognized in each of the creating states; or (4) several separate corporations each recognized everywhere—is of no importance, except for the practical results which follow the adoption of one fiction or another. * * * It is not a question of justice, but of ultimate convenience, in what court a corporation may sue or be sued. It is injustice, and not mere inconvenience, that an organization of any kind shall be compelled to pay its debts twice over. In selecting a fiction, moreover, it may sometimes be wise to take one which has some slight inconvenience in practical results, if its logical development is generally convenient, rather than another which has a slight advantage in some respects, but whose logical development would lead to such injustice that exceptions and subfictions must be numerous and strained.' What the stockholders of the New York, New Haven & Hartford Railroad Company have joined together so completely for their business convenience cannot be practically separated when it comes to the question of the situs of an obligation for purposes of garnishment. There is a practical unity of organization extending over

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three distinct jurisdictions. If we are to separate the corporations sharply, the same reasons which exist for denying that the situs of the debt is in Rhode Island would exist for denying that it is either in Massachusetts or Connecticut. The result would be that what, from a practical point of view is a single obligation, would, by an artificial division, require either a difficult accounting to determine the proportional parts of the obligation assumed by each corporation, or would require us in each instance to dismiss a suit begun by garnishment of the New York, New Haven & Hartford Railroad Company. The location of a business office for the transaction of affairs of the three corporations in the state of Connecticut cannot compel the plaintiff to resort to that jurisdiction. It is further contended that no garnishment process can run against accounts payable to a foreign railroad corporation arising out of the conduct of interstate commerce. The defendant relies upon *Philadelphia S. S. Co. v. Pennsylvania*, 122 U. S. 326, 7 Sup. Ct. 1118, 30 L. Ed. 1200. I am unable to see the applicability of that case. That a state tax upon the gross receipts of a steamship company derived from the transportation of persons and property by sea is held to be a regulation of interstate and foreign commerce in conflict with the exclusive powers of Congress under the Constitution does not lead to the conclusion that the earnings of a railroad company in interstate commerce are free from attachment for its debts. There is no analogy between the cases, and no authority is cited having any tendency to support the defendant's proposition. I am of the opinion that the state court acquired a limited jurisdiction by virtue of the attachment of a res. * * * The defendant's brief cites no case directly in conflict with the principles above set forth relating to the question of the right to garnish said moneys, on the ground that such garnishment is void as an interference with interstate commerce. The closest analogy is found in the case of *Davis v. C., C., C. & St. L. R. R. Co.* (C. C.) 146 Fed. 403, 413, decided in the United States Circuit Court for Iowa less than a month later than Judge Brown's decision, wherein it was held that sums due to a defendant railroad company (nonresident of the state where suit is brought) for its share of freight money earned on continuous interstate shipments over connecting lines and collected by the final carrier are as much a part of interstate commerce, as the actual carriage of the property; and so are not attachable by garnishment in the possession of the final carrier. As that suit relates to freight money earned, it is not directly in point. Furthermore, it does not settle the question finally, even in that suit, as it may not be affirmed on appeal. Nor do we consider this decision as authoritative upon principle; but, on the contrary, we consider it as extremely doubtful, since in our view freight money when earned

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remaining in the hands of the final carrier, would be a mere debt, with no special and peculiar character, subject to suit at law by the creditor road, if not paid, and so having only the common character of any simple contract or book indebtedness, and liable to garnishment by the common rule.

As to the question of the situs of the debt sought to be garnished in this case, and whether it was payable in Connecticut or in Rhode Island, and in support of the position above taken by Judge Brown and adopted by this court that it may be garnished in Rhode Island, see *Chicago, R. I. & P. v. Sturm*, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144; *Wyeth Hardware, etc., Co. v. Lang*, 127 Mo. 242, 29 S. W. 1010, 27 L. R. A. 651, 48 Am. St. Rep. 626; *Howland v. Ry. Co.*, 134 Mo. 474, 36 S. W. 29; *Wabash R. R. Co. v. Dougan*, 142 Ill. 248, 31 N. E. 594, 34 Am. St. Rep. 74; *Railroad v. Barnhill*, 91 Tenn. 395, 19 S. W. 21, 30 Am. St. Rep. 889; *Railroad v. Stollenwerck*, 122 Ala. 539, 25 South. 258; *Mahany v. Kephart*, 15 W. Va. 609; *Smith v. Railroad Co.*, 33 N. H. 337. Upon the authority of all the above cases, we are satisfied that the Union Pacific Railroad Company, the defendant in this suit, could have maintained its action at law either in this state or in Connecticut for the balance of indebtedness in its favor disclosed by the garnishee's affidavit; hence, we are of the opinion that the plaintiff in this suit has obtained a lawful attachment and garnishment of the moneys in question sufficient to give to the superior court limited jurisdiction of the plaintiff's suit, so far as this money is concerned.

The papers in the cause will be returned to the superior court, with the decision of this court certified thereon.

FT. MADISON ST. RY. CO. *v.* HUGHES *et al.*

(Supreme Court of Iowa, Dec. 11, 1907.)

[114 N. W. Rep. 10.]

Street Railroads—Use of Street—Moving Buildings.*—Code, § 767, provides that cities and towns may authorize or forbid the construction of street railroads within their limits, and authorize or forbid the location thereof on all streets, alleys, and public places, but that no railway track shall be laid until the injury to property abutting on the street, etc., has been ascertained and compensated for, etc. Held that, where a street railroad has been authorized to construct a line on a city street and has made compensation for any injury resulting to abutting property, it is entitled to restrain the moving of a house lengthwise on the street, which cannot be done without occupying the company's track, destroying its trolley wire, and interrupting for a considerable time the operation of its cars, as the rule that citizens may use the streets to the same extent as a railway company does not authorize the unreasonable occupation of the streets to the exclusion of others, or in such manner as to unreasonably prevent passage of cars.

Injunction—Action on Bond—Dismissal of Action—Burden of Proof.—Where a suit by a street railroad company to restrain defendants from moving a house along a street on which the street railway was located, and from interfering with complainant's trolley wires, poles, and overhead construction, etc., was dismissed, defendants, to recover on the injunction bond, having no right to move the house along the track, must prove that they had not threatened to tear down the railway company's overhead construction or to use the company's track as alleged.

Appeal—Review—Prejudice.—Where defendants in an action for an injunction were not entitled to recover on the injunction bond in any event on the issues as found, they were not prejudiced by an alleged error in the court's submission of the measure of damages.

*For the authorities in this series on the subject of the mutual rights and duties of street railways and other users of streets, see foot-notes appended to *Adams v. Camden, etc., Ry. Co.* (N. J.), 8 R. R. R. 790, 31 Am. & Eng. R. Cas., N. S., 790, where all those preceding it are collected; foot-notes appended to *Olney v. Omaha, etc., Ry. Co.* (Neb.), 23 R. R. R. 300, 46 Am. & Eng. R. Cas., N. S., 300; foot-notes appended to *McCarthy v. Consolidated Ry. Co.* (Conn.), 22 R. R. R. 685, 45 Am. & Eng. R. Cas., N. S., 685; foot-notes appended to *Indianapolis, etc., Co. v. Kidd* (Ind.), 22 R. R. R. 366, 45 Am. & Eng. R. Cas., N. S., 366; foot-notes appended to *United Rys. & Elec. Co. v. Watkins* (Md.), 22 R. R. R. 641, 45 & Eng. R. Cas., N. S., 641; *Weinberger v. North Jersey St. Ry. Co.* (N. J.), 22 R. R. R. 351, 45 Am. & Eng. R. Cas., N. S., 351.

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Injunction—Action on Bond—Voluntary Dismissal of Injunction Suit—Effect as Adjudication.—Under Code, § 3764, providing that an action may be dismissed, and such dismissal shall be without prejudice to a future action if made by the plaintiff before final submission of the case, plaintiff's voluntary dismissal of a suit for injunction did not constitute an adjudication of the issues in favor of defendants, which would sustain a recovery by them on the injunction bond.

Appeal from District Court, Lee County; Henry Bank, Jr., Judge.

The defendants Thomas and Frank Dodson are house movers, and had contracted with the defendant Hughes to move a certain house described as 16½ feet wide by 30 feet long and 21 feet high, from a point in the western limits of Ft. Madison to the north side of Santa Fé avenue between Hanover street and Van Valkenburg avenue, and had loaded it on timbers 30 feet long resting on wagons, and had reached a point opposite Ivanhoe Park, and contemplated proceeding with it along Santa Fé avenue, a distance of about 1¼ miles. The Ft. Madison Street Railway Company operated a street railway along this avenue, and its wires were so strong that the house could not be taken further without their removal, and the defendants notified the company that they were about to move the house over its track, and that it was of such dimensions that "all stay, trolley, and other wires of your company will interfere and obstruct" its passage, and required the "wires and other obstructions" to be taken out of the way "so fast as it is possible to proceed therewith." Thereupon, in November, 1901, the company sued out a writ of injunction enjoining defendants "from moving said house over and along plaintiff's track upon Santa Fé avenue and from interfering in any way with the trolley wires, span wires, poles, and overhead construction of said plaintiff, and from interfering with or interrupting the regular and continuous running of its cars upon its said track." The defendants answered January 13, 1902, and on the same day filed a cross-bill, praying that the court direct the removal of all obstructions to the passage of the vehicles bearing the house along the avenue, on the ground that the company accepted its franchise burdened with duty of so using the street as not to obstruct the same or interfere with travel thereon. On September 20th, the same year, the company dismissed its petition, and five days later defendants amended their cross-petition by alleging that the obstructions of the company interfered with their business as house movers, and also alleging the dissolution of the writ of injunction, and praying for judgment on the bond for damages resulting from its alleged wrongful issuance. October 10, 1903, a motion for more specific statement was sustained and another

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amendment to the cross-petition filed. February 12, 1904, the court on its own motion directed defendants to file a petition separating the law issues from those to be heard in equity. This was done February 23, 1904, and in June following an answer thereto was filed by the company and also an answer to the cross-petition in equity. Some other pleadings were filed in the equitable cause, and the same came on for hearing February 13, 1905, and on the 6th of May, 1905, was decided by the entry of a decree dismissing the cross-petition of defendants and amendments thereto. September 28th following the defendants amended their cross-petition at law, and on February 28, 1906, the company amended its answer by pleading, among other things that the decree referred to was an adjudication that defendants had no right "to interfere with and molest the street car track and overhead construction of said company." On the following day defendants amended their cross-petition, and the parties proceeded to trial, resulting in a verdict for the company upon which judgment was entered. The defendants appeal. Affirmed.

John L. Benbow and D. F. Miller, for appellants.
George B. Stewart, for appellee.

LADD, J. The right of the plaintiff to operate an electric street railway along Santa Fé avenue is not questioned. The trial proceeded on the theory that the company had a franchise so to do, and it necessarily follows that the means essential for that purpose, such as the setting of poles and stringing of the trolley and other wires, might be employed. Of course, all this must have been done in such a manner as not unnecessarily to interfere with the ordinary uses of the street for travel. No claim is made that this rule was violated unless it shall be held that moving houses along the highway is one of these ordinary uses. The company was in the enjoyment of a right which is unquestioned. It may move its cars along the street according to its own plans, if reasonable precautions are made for both the service and protection of the public. The right to do so is to be guarded as fully as that of other citizens in their use of the street for travel by the ordinary means employed for that purpose. Its facilities for rapid and convenient transportation have been established in pursuance of law and the action of the city, at a large expense, and the value thereof ought not to be unduly impaired and the carriage of passengers interrupted by the obstruction of the street for any considerable time by the moving of large buildings thereon. It is true that citizens ordinarily have the right to use the streets to the same extent as the railway company, but this does not authorize them unreasonably to occupy such streets, to the exclusion of all others, or to prevent

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the passage of cars. Of course, the latter may be required to stop temporarily for the loading or unloading of vehicles and the like for domestic and commercial purposes, for one of the main objects in establishing streets is to afford access to properties abutting thereon. Here the defendants proposed to move the house along the plaintiff's track for a distance of a mile and a quarter, thereby not only stopping the running of its cars for many hours and probably for several days, but requiring the removal of its trolley and other wires as well. This would be inconsistent with the company's right to occupy the street. Section 767 of the Code provides that "cities and towns shall have the power to authorize or forbid the construction of street railways within their limits and may define the motive power by which the cars thereon shall be propelled; and to authorize or forbid the location and laying down of tracks for railways and street railways on all streets, alleys, and public places; but no railway track can thus be located and laid down until after the injury to property abutting upon the street, alley, or public place upon which such railway track is proposed to be located and laid down has been ascertained and compensated for in the manner provided with reference to taking private property for works of internal improvement." Having made compensation for any injury resulting to abutting property, laid its track in the street, and estimated its line in pursuance to this statute, the company had the right to operate the same, and to the full, free and complete exercise of the franchise with which it was clothed. That a street railway interferes with ordinary travel to some extent cannot be doubted. This is necessarily taken into account in permitting its use of the street and in assessing damages resulting therefrom. And there is no doubt but that one desiring to change the location of a house or other structure may move it along a public street, providing the conditions of the street are such that this may be done without injury to others having a prior right thereto, and providing, further, that this does not by interfering with travel become a nuisance. But, where the use of the street has been lawfully appropriated in so far as essential for the operation thereon of an electric street railway, one of the modern conveniences of travel and transportation, there is no tenable ground for demanding that its operation shall cease or be unduly interfered with, or that the value of its franchise shall be impaired or its property destroyed to enable another to make an unusual and extraordinary use of the street in the moving of houses or other structures over it. This would be inconsistent with the franchise granted to which the street has become subject. The rights of the defendants to the use of the street was limited by those of the company to operate its cars thereon, and they could not insist upon the elimination of its franchise rights in order to give way

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to them over the road in moving the house. In other words, the defendants had the right to the use of the street as it was, with the trolley line in operation, and not as it would have been had no franchise been granted by the city of Ft. Madison; and, as they could not move the house lengthwise on the street as they intended without occupying the company's track, destroying the trolley line, and interrupting for a considerable time the operation of its cars, the jury was rightly instructed that they were not entitled to take the house into that street. As directly in point see *Millville Traction Co. v. Goodwin*, 53 N. J. Eq. 448, 32 Atl. 263; *Williams v. Citizens' Ry. Co.*, 130 Ind. 71, 29 N. E. 408, 15 L. R. A. 64, 30 Am. St. Rep. 201; *Dickinson v. Electric L. & M. Co.*, 53 Ill. App. 379; *Croswell on Electricity*, § 259, 1 *Joyce on Electric Law*, § 481; *Roads and Streets*, 578. See, for the valuation discussion of the subject, *Northwestern Tel. Co. v. Anderson*, 12 N. D. 585, 98 N. W. 706, 65 L. R. A. 771, 102 Am. St. Rep. 580. In *Williams v. Citizens' R. Co.*, *supra*, in deciding a like question: "The purpose for which highways are laid out and dedicated is that of travel in the usual modes. It would be strange, indeed, if large buildings could be moved along the thronged streets of a city without control or restriction; and it would be equally as strange if the owner of a building could destroy the property of others in order to enable him to move his building from one place to another."

2. As the defendants had no right to move the house along the company's track, it necessarily follows that, in order to have recovered on the bond, they must have shown that they had not threatened to tear down the overhead construction, or to use the company's track as alleged, for this was all the writ of injunction prohibited them from doing. This issue was fairly submitted to the jury. Its finding was for the company, so that, even if there was error in the rule for the measure of damages as given by the court, and there was none, defendants could not have been prejudiced thereby. The contention that the dismissal of the petition for the writ of injunction constituted an adjudication is disposed of by section 3764 of the Code. As defendants had no right to move the house on the company's tracks, it is not important whether this had been adjudicated in the equity case. The suggestion that defendants were entitled to notice before the issuance of the writ of injunction is without merit. Other matters touched in argument require no consideration.

Affirmed.

ECKELS et al. v. MUTTSCHALL.

(Supreme Court of Illinois, Oct. 23, 1907. Rehearing Denied Dec. 10, 1907.)

[82 N. E. Rep. 872.]

Appeal—Estoppel to Allege Error—Acquiescence of Party.—Where an action was brought against a street railroad company and the receivers of another company jointly, and at the trial counsel for defendants acquiesced in the statement of the court that plaintiff had brought his suit against the right defendants, defendants cannot on appeal raise any question of misjoinder of parties, though a motion in arrest of judgment was made on that ground.

Evidence—Opinion—Basis.—Where, in an action against a street railroad for injuries to one who was struck by a car, the undisputed evidence showed that the car was running at a high rate of speed at the time of the accident, it was not error to refuse to strike out the testimony of a witness that the car was running at the rate of 20 miles an hour at the time of the accident; the witness stating on cross-examination that he knew it was going at that rate, because he knew it to go "very fast out there."

Same—Expert Testimony.—In an action for personal injuries, the testimony of a physician who treated plaintiff at the time of his injury and had examined him a few days before the trial, that plaintiff had degeneration of the spinal cord, based on subjective symptoms only, was admissible; the fact that witness, in arriving at his conclusions, was guided somewhat by what the plaintiff said to him, not making his evidence incompetent.

Street Railroads—Exclusive Right to Use of Streets.*—A street railroad has not the exclusive right to the use of its car tracks on the public streets of a city.

Damages—Measure—Instructions.—In an action against a street railway for injuries to one who was struck by a car, an instruction that plaintiff could only recover for injuries alleged and proved and for damages sustained by reason of said injuries was not erroneous as permitting plaintiff to recover for injuries not the result of the accident.

Negligence—Contributory Negligence—Imputed Negligence—Driver and Occupant of Private Vehicle.†—Where a street car is

*See preceding case, and foot-notes.

†For the authorities in this series on the subject of imputed negligence, see extensive note, 10 R. R. R. 114, 33 Am. & Eng. R. Cas., N. S., 114; foot-notes appended to *Shultz v. Old Colony St. Ry.* (Mass.), 25 R. R. R. 782, 48 Am. & Eng. R. Cas., N. S., 782; *Baker v. Norfolk & S. R. Co.* (N. Car.), 25 R. R. R. 760, 48 Am. & Eng. R. Cas., N. S., 760; foot-notes appended to *Thompson v. Pennsyl-*

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negligently run into a vehicle, one riding in the vehicle, and injured thereby without negligence on his part, may recover for the injuries, although the driver of the vehicle was negligent.

Trial—Instructions—Singling Out Testimony.—In an action against a street railway for injuries received by plaintiff while riding in a vehicle struck by defendant's car, the declaration did not allege which way the vehicle was going at the time of the accident, though plaintiff's proof showed it was going east at that time. Held, that an instruction, based on testimony of defendant's witnesses, that if the vehicle was being driven in a westerly direction at the time of the accident there could be no recovery, was promptly refused, as singling out portions of the testimony.

Same—Ignoring Evidence.—The instruction was also erroneous as entirely ignoring defendant's negligence; it being immaterial which way the vehicle was going at the time of the collision, if defendant was negligent and plaintiff free from negligence.

Appeal from Branch Appellate Court, First District, on Appeal from Superior Court, Cook County; Joseph E. Gary, Judge.

Action by Charles Muttschall against James H. Eckels and others. A judgment for plaintiff was affirmed by the Appellate Court, and defendants appeal. Affirmed.

This was an action on the case, commenced by Charles Muttschall against the West Chicago Street Railroad Company and James H. Eckels and two others, as receivers of the Chicago Union Traction Company, in the superior court of Cook county, to recover damages for a personal injury alleged to have been sustained by plaintiff in consequence of his being thrown to the pavement from a one-horse, two-seated open surrey, in which he was riding upon one of the streets of the city of Chicago, by reason of said surrey being run against by an electric car operated upon the track of the West Chicago Street Railroad Company by the receivers of the Chicago Union Traction Company. The declaration contained one count, and each of the defendants filed the plea of the general issue. A trial resulted in a verdict and judgment in favor of the plaintiff for \$9,000, which has been affirmed by the Branch Appellate Court for the First District, and a further joint appeal has been prosecuted to this court by the defendants. The evidence introduced by the plaintiff fairly tended to show that the plaintiff, at about 7 o'clock on the evening of the 3d of May, 1903, was riding east upon North avenue, in the city of Chicago, between Forty-Fourth and Forty-Fifth avenues, in a two-seated open surrey, drawn by one horse, in

vania R. Co. (Pa.), 25 R. R. R. 695, 48 Am. & Eng. R. Cas., N. S., 695; Cotton v. Willmar & S. F. Ry. Co. (Minn.), 25 R. R. R. 501, 48 Am. & Eng. R. Cas., N. S., 501; foot-notes appended to Southern Ry. Co. v. King (Ga.), 24 R. R. R. 785, 47 Am. & Eng. R. Cas., N. S., 785.

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company with his brother-in-law, Bustav Natzke, the owner of the horse and surrey, who was driving at the time of the accident; that Natzke and plaintiff occupied the first seat and Mrs. Natzke and her child the rear seat; that as they were riding between Forty-Fourth and Forty-Fifth avenues they were overtaken by an electric car running at a high rate of speed, which struck the surrey from the rear with great force; that the surrey was capsized, the wheels broken off, and it was otherwise damaged, and plaintiff and the other occupants thereof were thrown to the pavement, and the plaintiff was severely injured; that there was a double track at the place of the injury, with ditches upon either side thereof; that the east-bound track was the south track, upon which Natzke was driving at the time of the injury. Mr. and Mrs. Natzke and the plaintiff all testified that the approaching car was not discovered by them until it was almost upon them, when Mrs. Natzke called out, "My God! there is a car right in back of us!" that Natzke attempted to turn the horse and surrey onto the north track, but the surrey was almost instantly struck by the car and thrown over, and the person therein thrown out; and that the car ran nearly 100 feet after the collision before it was stopped. The trial court, after overruling motions for a new trial and in arrest of judgment made by each of the defendants, entered a judgment in the following form: "It is considered by the court that the plaintiff do have and recover of and from the defendants his said damages of \$9,000, in form as aforesaid by the jury assessed, together with his costs and charges in this behalf expended, and to be paid in due course of administration as receivers."

John A. Rose and Albert M. Cross (W. W. Gurley, of counsel), for appellants.

John T. Murray, for appellee.

HAND, C. J. (after stating the facts as above). The first contention of the appellants is that the court erred in overruling their motion in arrest of judgment, on the ground that the West Chicago Street Railroad Company and said receivers of the Chicago Union Traction Company were improperly joined as defendants in said action, as it is said a joint judgment cannot properly be rendered against said defendants, as the judgment against the West Chicago Street Railroad Company should be against said railroad company personally, and the judgment against said receivers of the Chicago Union Traction Company should not be against said receivers personally, but to be paid by them in the due course of administration. If the contention of the appellants that the West Chicago Street Railroad Company and the receivers of the Chicago Union Traction Company cannot be sued jointly in this action for the reason suggested, had that question

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not been waived upon this record, be conceded to be sound, we think it clear that the appellants have waived their right to raise that question upon this record, if they can waive it; and that they can waive such right we have no question. In this case the record shows that defendants admitted upon the trial that the car tracks on North avenue, at the point of the accident, were owned by the West Chicago Street Railroad Company, and that the road was then operated by the receivers of the Chicago Union Traction Company. After such admission was made the court inquired of counsel: "The effect of that is, if anybody is to blame on the side of the defendants, that they have got the right people as defendants? I say, if there is any fault in the operation of the tracks, they have sued the right people?"—to which counsel for the defendants replied, "I don't know of anything to the contrary, your honor." The declaration declared against the West Chicago Street Railroad Company and the receivers of the Chicago Union Traction Company jointly, and the defendants had an opportunity, in replying to the interrogatory propounded to counsel by the court, to state whether they had any objection as to the manner in which the defendants had been sued, and, instead of raising the question of misjoinder now sought to be raised, counsel for the defendants acquiesced in the statement of the court that the plaintiff had brought his suit against the right defendants. We think, therefore, the defendants, after the trial had proceeded to verdict and final judgment, cannot in a court of review, in the face of such admission, raise the question of misjoinder of parties by a motion in arrest of judgment.

The next contention of appellants is that the court erred in refusing to strike out the evidence of the witness Gustav Natzke that the car was running at the rate of 20 miles an hour at the time it struck the surrey. The witness testified, on direct examination, that the car was running at the rate of 20 miles an hour at the time it struck the surrey, and, when cross-examined upon that subject, he said he knew it was going 20 miles an hour, "because I know it to go very fast out there," whereupon defendants moved to strike out the statement of the witness that the car was running at the rate of 20 miles per hour at the time of the accident. The witness was present at the time of the collision, and it was proper for him to express an opinion as to the rate of speed at which the car was moving at the time of the accident, and for the defendants to cross-examine him upon that subject; and the weight to be given to his testimony, after hearing his direct and cross examination, rested with the jury. The car evidently was running at a high rate of speed at the time of the accident, as the undisputed evidence shows the surrey was thrown over, the wheels were broken off, the parties riding therein were thrown to the pavement, and the car ran 100 feet before it was

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stopped. We do not think the court committed error in declining to strike out the testimony of said witness as to the rate of speed at which the car was running at the time of the accident.

It is also urged that the court erred in permitting Dr. Ide to testify that plaintiff had degeneration of the spinal cord, based upon subjective symptoms only. Dr. Ide had treated the plaintiff from the time of his injury, and had examined him a few days before the trial. He testified fully to the physical conditions he found in the plaintiff immediately after the injury; also just prior to the trial. He stated that the plaintiff was lame; that he had curvature of the spine and degeneration of the spinal cord. The fact that the doctor, in arriving at his conclusions, was guided somewhat by what the plaintiff said to him, did not make his evidence incompetent, and subject to be stricken out on the motion of the defendants. *City of Chicago v. McNally*, 227 Ill. 14, 81 N. E. 23.

It is also contended that the court gave to the jury improper instructions on behalf of the plaintiff, and improperly refused to give to the jury the fifth instruction offered on behalf of the defendants. The court gave to the jury three instructions on behalf of the plaintiff, all of which, it is contended by the defendants, are erroneous. The first instruction given for the plaintiff informed the jury the defendants had not the exclusive right to the use of their car tracks upon the public streets of the city of Chicago. We think this instruction justified by the holding of this court in *North Chicago Electric Railway Co. v. Peuser*, 190 Ill. 67, 60 N. E. 78. The second instruction was upon the measure of damages, and it is said the instruction permitted the plaintiff to recover damages for injuries not the result of the accident. We do not so read the instruction. The jury were informed thereby the plaintiff could only recover for injuries "alleged and proved," and that he could only recover for damages sustained by reason of "said injuries." This instruction is very similar to an instruction approved by this court in *Chicago City Railway Co. v. Allen*, 169 Ill. 287, 48 N. E. 414. And the third instruction informed the jury that the negligence of the driver of the surrey alone would not relieve the defendants of liability, if the jury believed, from a preponderance of the evidence, that the defendants were guilty of the negligence charged in the declaration, and that plaintiff was free from negligence. The instruction, we think, announced a correct rule of law. If the plaintiff was not guilty of negligence, the defendants would not be relieved of liability to the plaintiff, if they were guilty of negligence, merely on the ground that the driver of the surrey was guilty of negligence. *Chicago Union Traction Co. v. Leach*, 215 Ill. 184, 74 N. E. 119.

The instruction offered on behalf of the defendants, and re-

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fused, upon which error is assigned, sought to inform the jury if the surrency in which the plaintiff was riding was being driven in a westerly direction at the time of the accident there could be no recovery. The declaration upon which the case was tried did not allege which way the surrency was going at the time of the accident, although the plaintiff's proof showed it was going east at that time. The instruction was sought to be based upon the testimony of the motorman and conductor in charge of the car, who testified they met the rig at the time of the injury. It is not permissible to single out, in a case like this, a particular fact claimed to be established by the evidence, and instruct the jury that, if such fact is proven, there can be no recovery. If this could be done, each claimed fact might be incorporated in such an instruction, and the plaintiff defeated thereby in a case where, upon all the evidence in the case, he would clearly be entitled to recover. The instruction was also wrong in that it entirely ignored the negligence of the defendants. The gist of the action was the improper operation of the car, and if the accident which caused the injury was the result of the negligent operation of the car by the defendants, and the plaintiff was not guilty of negligence, the plaintiff would be entitled to recover, regardless of which way the surrency was going at the time of the collision.

Finding no reversible error in this record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

DAUGHERTY v. CHICAGO, M. & ST. P. RY. CO.

(Supreme Court of Iowa, Feb. 14, 1908.)

[114 N. W. Rep. 902.]

Carriers—Who Are Passengers.*—Plaintiff, a boy seven years old, was invited by certain of the sectionmen to get on a hand car for a ride. The foreman ordered the men to help the boy on the car, and told him to "hold on tight." He held on until the car had gone 300 or 400 feet when he got dizzy, fell off, and was injured. Held, that he was not a passenger, but was either a licensee or a trespasser.

Railroads—Injury to Licensees or Trespassers—Proximate Cause.†—The original wrong in placing the boy in a dangerous position on

*See first foot-note appended to *Louisville & N. R. Co. v. Cottengim* (Ky.), 25 R. R. R. 659, 48 Am. & Eng. R. Cas., N. S., 659.

†For the authorities in this series on the question what is, and is not, the proximate cause of an injury, see foot-notes appended to *Missouri, etc., Ry. Co. v. Welch* (Tex.), 25 R. R. R. 700, 48 Am. & Eng. R. Cas., N. S., 700; *Liles v. Fosburgh Lumber Co.* (N. Car.), 25 R. R. R. 517, 48 Am. & Eng. R. Cas., N. S., 517; *Hayes v. Southern*

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the car, for which defendant was in no way responsible, was the proximate cause of the injury.

Same—Wanton and Malicious Conduct.—Where defendant's sectionmen negligently permitted a child to ride on a hand car in a dangerous position, so that he became dizzy, fell off, and was injured, there was no evidence of wanton or malicious conduct on the part of such employees as would justify a recovery.

Same—Negligence.†—Where sectionmen permitted a child to ride on a hand car in a dangerous position, and he fell from the car and was injured, the acts of such employees, being outside the scope of their authority, defendant could not be charged with their negligence in injuring the child after they had placed him in a dangerous position, no matter how gross it might be.

Same—Dangerous Agency.—Where sectionmen permitted a child to ride on a hand car from which he fell, the injury being due not to the dangerous character of the car, but to the negligence of those in charge thereof, outside their employment, defendant could not be made liable either on the theory of the turntable cases, or that the car was a dangerous agency and that defendant was responsible for the acts of its agents in charge thereof.

Master and Servant—Injuries to Third Person—Act of Master.†—An act done by a servant, while engaged in his master's work, causing injury to a third person, but not done for the purpose of performing that work, cannot be deemed the act of the master.

Appeal from District Court, Appanoose County; C. W. Vermillion, Judge.

Action at law to recover damages for injuries received by plaintiff in being run over by a hand car operated by defendant's sectionmen. Directed verdict for defendant, and plaintiff appeals. Affirmed.

Ry. Co. (N. Car.), 24 R. R. R. 547, 47 Am. & Eng. R. Cas., N. S., 547; Chicago, etc., R. Co. v. Chestnut Bros. (Ky.), 24 R. R. R. 108, 47 Am. & Eng. R. Cas., N. S., 108; foot-notes appended to Thompson v. Cleveland, etc., Ry. Co. (Ill.), 23 R. R. R. 233, 46 Am. & Eng. R. Cas., N. S., 233; Stone v. Union Pac. R. Co. (Utah), 23 R. R. R. 119, 46 Am. & Eng. R. Cas., N. S., 119.

†For the authorities in this series whether the master's liability for the negligence or torts of his servants depends upon whether they occurred while the servant was acting within the scope of his employment, see foot-notes appended to Southern Ry. Co. v. Power Fuel Co. (C. C. A.), 24 R. R. R. 800, 47 Am. & Eng. R. Cas., N. S., 800; Louisville & N. R. Co. v. Gillen (Ind.), 24 R. R. R. 511, 47 Am. & Eng. R. Cas., N. S., 511; Sawyer v. Norfolk & S. R. Co. (N. Car.), 25 R. R. R. 530, 48 Am. & Eng. R. Cas., N. S., 530 foot-notes appended to Roberts v. Southern Ry. Co. (N. Car.), 22 R. R. R. 106, 45 Am. & Eng. R. Cas., N. S., 106.

For the authorities in this series on the question what acts are, and are not, within the scope of employment of a railroad employee, see foot-notes appended to Sawyer v. Norfolk & S. R. Co. (N. Car.), 25 R. R. R. 530, 48 Am. & Eng. R. Cas., N. S., 530.

*Daugherty v. Chicago, etc., Ry. Co**Howell & Elgin*, for appellant.*F. S. Payne and Cook, Crocker, Loomis & Tourtellot*, for appellee.

DEEMER, J. The alleged grounds of negligence are "in permitting the said minor plaintiff to board the said car and ride the same at the front edge thereof in an exposed position, without aid or protection of any kind," and "that shortly before the plaintiff was injured, and while the hand car was stationary, said section boss saw said infant sitting in a position of peril on said car, and, so seeing, ordered the other persons on said car, who were under the direction of said [boss], to start up said car, which was done." The record shows that plaintiff is a boy seven years old, living with his parents close to the defendant's right of way. One Hull was defendant's section foreman in charge of the hand car which injured the plaintiff. As the car was coming to the station where it was kept, conveying the men from the place where they had been working during the day, and as it passed the house where the boy lived, he was seen standing close to the track, and one of the sectionmen invited him to get upon the car. Pursuant to the invitation, the foreman stopped the car, and ordered the men to help the boy thereon. The car proceeded to the depot, where some tools were to be loaded to be taken to the toolhouse, and all the men got off the car. After the tools were loaded two men got on one end of the car and the little boy got on the other. The foreman did not get upon the car, but ordered the men to take it to the toolhouse, and, seeing the boy on the car remarked: "Hold on tight." The boy said in his testimony that he had hold of the handle bars of the car, and kept hold for a little while until he got dizzy and then let go, resulting in his falling from the car after it had gone 300 or 400 feet, and receiving the injuries of which he complains. It is manifest, of course, that the boy was not a passenger, and that defendant's liability cannot be predicated upon that theory. The injury was due to the wrong of defendant's employees entirely outside of the scope of their employment, and defendant cannot be held responsible therefor.

The only possible theory upon which there could be a recovery is that the boy was either a licensee or a trespasser, and that defendant was charged with the duty of not wantonly or purposely injuring him. But to this proposition there are several answers. In the first place the original wrong for which defendant was in no way responsible was the proximate cause of the injury to the boy. Again, there is no evidence of any such wanton or malicious conduct upon the part of defendant's agents as would justify a recovery. And, lastly, as to the employees who injured the boy, he was not a trespasser, for they invited him upon the car, and, although defendant is not responsible for the conduct of these

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men in extending the invitation, it cannot be charged with the negligence of the sectionmen, no matter how gross in injuring the boy, after they had themselves placed him in the dangerous position. In all that they did they were acting outside of the scope of their authority and for some purposes of their own, and defendant should not under the circumstances be held liable for their negligence. *Keating v. Railroad Co.*, 97 Mich. 154, 56 N. W. 346, 37 Am. St. Rep. 328. Defendant should not be held liable either for their original wrong, or for the consequences thereof. If the boy had got upon the car without the consent of the sectionmen, he would have been a trespasser, and defendant would only be held responsible in such a case if they wantonly or purposely injured him, after discovering his presence. The rule in the so-called turntable cases, as announced in *Edgington v. Railway*, 116 Iowa, 410, 90 N. W. 95, 57 L. R. A. 561, has no application whatever.

Appellant contends, however, that the car was a dangerous agency, and that defendant is responsible for the acts of its agents in charge thereof. This rule has no application to the case at bar. The injury to plaintiff was due not to the dangerous character of the car, but to the negligence of those having it in charge, and it was not such negligence as to render defendant responsible. *Foster Co. v. Pugh*, 115 Tenn. 688, 91 S. W. 199, 4 L. R. A. (N. S.) 804, 112 Am. St. Rep. 881; *Schulwitz v. Lumber Co.*, 126 Mich. 559, 85 N. W. 1075; *Railway v. Bolling*, 59 Ark. 395, 27 S. W. 492, 27 L. R. A. 191, 43 Am. St. Rep. 38; *Morris v. Brown*, 111 N. Y. 318, 18 N. E. 722, 7 Am. St. Rep. 751. It is a general rule that an act done by a servant while engaged in his master's work but not done as a means or for the purpose of performing that work, is not to be deemed the act of the master. *Bowler v. O'Connell*, 162 Mass. 319, 38 N. E. 498, 27 L. R. A. 173, 44 Am. St. Rep. 359; *Gillett v. Railway*, 55 Mo. 315, 17 Am. Rep. 653; *Formall v. Oil Co.*, 127 Mich. 496, 86 N. W. 946; *Driscoll v. Scanlon*, 165 Mass. 348, 43 N. E. 100, 52 Am. St. Rep. 523.

There is no testimony to show that the injuries were either wantonly, purposely, or maliciously inflicted, and no possible grounds are shown for holding the defendant liable. See, as sustaining these conclusions, *Smith v. R. R.*, 124 Ind. 394, 24 N. E. 753; *Gravel Road Co. v. Gause*, 76 Ind. 142, 40 Am. Rep. 224.

The judgment is therefore affirmed.

KEESHAN *v.* ELGIN, A. & S. TRACTION CO.

(Supreme Court of Illinois, Oct. 23, 1907.)

[82 N. E. Rep. 360.]

Negligence—Care Required by One Intoxicated.*—Where plaintiff's intestate was killed by falling from a bridge while in a state of intoxication, the fact that he was intoxicated did not excuse him from exercising such care as may reasonably be expected from one who is sober.

Carriers—Injury to Passenger—Declarations—Sufficiency.—A declaration alleged that defendant's servants, after accepting intestate on its car as a passenger, put him off at a station five miles from his destination on a stormy night and where he could obtain no shelter, knowing that he was intoxicated and unable to care for himself, and that in attempting to walk home along defendant's track he fell from its bridge and received injuries from which he died. Held insufficient, since it fails to establish a connection between the alleged wrongful act of ejection and the injury received by falling from the bridge.

Same—Proximate Cause of Injury.†—It is not necessary, to the liability of a common carrier for an injury resulting from an act of its servants, that they should be able to anticipate the particular injury which might result; but it cannot be held liable for failing to provide against a possible injury which could not have been reasonably anticipated.

Appeal from Appellate Court, Second District, on Appeal from Circuit Court, Kan County; C. A. Bishop, Judge.

Action by Mary E. Keeshan, administratrix of the estate of Edward J. Keeshan, deceased, against the Elgin, Aurora & Southern Traction Company, for wrongfully causing the death of plaintiff's intestate. Form a judgment of the Appellate Court, affirming a judgment of the circuit court sustaining a general and special demurrer to the declaration, plaintiff appeals. Affirmed.

Fisher & Mann (R. N. Bostford of counsel), for appellant.
Hoopkins, Peffers & Hopkins, for appellee.

CARTWRIGHT, J. The appellant, Mary E. Keeshan, administra-

*See third foot-note appended to *Vizacchero v. Rhode Island Co.* (R. I.), 14 R. R. R. 172, 37 Am. & Eng. R. Cas., N. S., 172, where all the authorities on the subject in this series preceding it are collected; foot-notes appended to *Black v. New York, etc., R. Co.* (Mass.), 23 R. R. R. 44, 46 Am. & Eng. R. Cas., N. S., 44.

†For the authorities in this series on question, what is, and is not, the proximate cause of an injury, see preceding case, and foot-notes.

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trix of the estate of her deceased husband. Edward J. Keeshan, filed in the circuit court of Kane county her declaration against appellee, the Elgin, Aurora & Southern Traction Company, charging it with wrongfully causing the death of said Edward J. Keeshan. The defendant filed a general demurrer to the declaration, and afterward, by leave of court, added seven special causes of demurrer. The court sustained the demurrer, general and special, and, the plaintiff having elected to stand by the declaration, the court entered judgment against her for costs. The Appellate Court for the Second District affirmed the judgment, except as to an order for execution against the plaintiff, and this further appeal was prosecuted.

The declaration consists of three counts, the first of which alleges the following facts: That on March 13, 1904, defendant was operating a railroad extending from the city of St. Charles, in Kane county, to the city of Elgin, in the same county; that on said day, at Riverview Switch, a station on said road, Edward J. Keeshan became a passenger, for a certain fare and reward, in a car bound for the said city of Elgin; that when he entered said car he was very much intoxicated and unable to care for himself, which was known to the defendant's servant in charge of the car; that on the arrival of the car at station 31, and before the arrival of the car at Elgin, the defendant, by its said servant, forcibly and violently, and with insult and injury, and with great and unnecessary violence, expelled Keeshan from said car and refused to permit him to re-enter the same; that it was nighttime, and the weather was cold and stormy, and snow was rapidly falling, and the wind was blowing very hard; that there was no shelter at station 31, or in the immediate neighborhood; that the home of Keeshan, where he wished to go, was at Elgin, five miles from station 31; that he was still very much intoxicated and unable to care for himself; that 10 minutes after he was expelled from the car he started to walk from said station to his home in Elgin while so intoxicated and in said state of the weather; that in endeavoring to cross a certain bridge over Fox river, on the line of said railroad, on his way home, and while using due care and caution for his own safety, and while the weather was cold and stormy, and the snow then and there rapidly and heavily falling, he fell off or walked off said bridge into the water of the river, which was icy cold, and out of which he was unable to get without assistance; that he remained there for two hours, until assisted by other persons to get out, and that as a result thereof he died on March 14, 1904, leaving plaintiff, his widow, and a daughter, who were deprived of their means of support. The same facts are alleged in the second and third counts, with the exception that in the second count it is alleged that at Riverview Switch the deceased changed from a passenger car used for the

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conveyance of passengers towards the city of St. Charles and entered the car for the carriage of passengers towards the city of Elgin.

The declaration alleges that Keeshan was expelled from the car with unnecessary violence, and the law does not justify the use of unreasonable or excessive force; but the declaration does not allege that any injury resulted from the act of expulsion from the car or the unnecessary violence charged. The death of Keeshan is alleged to have been caused by his falling off or walking off of a railroad bridge at another time and place, so that the averment of excessive force adds nothing to the supposed cause of action. It is neither alleged in the declaration nor claimed by counsel that defendant was bound to carry Keeshan to the city of Elgin, where he resided, nor that he could not have been rightfully ejected from the car at a proper time and place; but it is insisted that the declaration states a cause of action by averring that he was expelled from the car when he was intoxicated and incapable of exercising care in his own behalf, at a place and under conditions where he was exposed to a known peril. The propositions stated by counsel are, in substance, that although a passenger who is intoxicated to such a degree as to render him unable to care for himself, and who refuses to pay fare, may be rightfully ejected at the proper time and place, such facts will not justify an expulsion without exercising due care with reference to time, place, and surroundings; that a carrier of passengers has no right to eject such a person at a time or place where he will be subject to danger of bodily injury; and that, if he is ejected under such circumstances, the carrier is liable for resulting damages. If these propositions are correct, it does not follow that the declaration states a cause of action, since it is necessary that the declaration should establish a connection between the alleged wrongful act and the injury. If a helpless drunken passenger is expelled from a car in the condition of the weather alleged in the declaration, it might be a probable consequence that he would be injured by exposure to the cold and storm, or, if he was unfit to care for himself, it might be a natural result that he would be run over and injured or killed by other cars. But no such injury resulted. It is true that, if Keeshan had not been ejected from the train and had been carried to Elgin, he would not have walked off or fallen off the bridge; but it is conceded by counsel that defendant was not bound to carry him to Elgin, and that the only wrong alleged relates to his expulsion in the state of the weather alleged and at a place where there was no shelter.

It is alleged that he wished to go to his home in Elgin, and, if the defendant was not bound to carry him, his only recourse was to walk, and that he attempted to do. He would naturally and

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probably have set out for home on foot, if he had never been admitted to the car, or never been expelled therefrom. His starting for home had no connection with his being or having been on the car, except that the defendant refused to carry him, which it had a right to do, and his attempt to walk to his home across defendant's bridge has no apparent connection with his expulsion from the train. There is no allegation that it was necessary for him to cross the bridge on account of the weather, or the place where he was left, or that there was no highway by which he could have reached his home. The defendant is not charged with any fault in respect to its bridge, if there could be any duty to maintain a railroad bridge in condition for foot passengers. Keeshan's falling from the bridge is not chargeable to any defect in the bridge, but to his intoxication, and voluntary intoxication will not excuse a person from exercising such care as may reasonably be expected from one who is sober. *Toledo, Peoria & Warsaw Railway Co. v. Riley*, 47 Ill. 514; *Chicago, Rock Island & Pacific Railroad Co. v. Bell*, 70 Ill. 102; *Illinois Central Railroad Co. v. Cragin*, 71 Ill. 177; *South Chicago City Railway Co. v. Dufresne*, 200 Ill. 456, 65 N. E. 1075; *Thompson on Negligence*, § 2935. It putting Keeshan off at the time and place alleged was a wrongful act on account of the condition of the weather, the declaration shows no natural connection between that act and the consequences which resulted from his attempting to walk to his home, in his intoxicated condition, across defendant's bridge. If it was not necessary to a liability of the defendant that its servant in charge of the car should be able to anticipate the particular injury which might result from a wrongful act, still the defendant cannot be held liable for failing to provide against a possible injury which could not have been reasonably anticipated. If Keeshan was expelled and left in a place where he was exposed to unnecessary peril in his drunken condition, on account of the cold and storm, there is no connection between that act and his walking or falling off the bridge.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

ILLINOIS CENT. R. CO. *v.* SILER.

(Supreme Court of Illinois, Oct. 23, 1907.)

[82 N. E. Rep. 362.]

Railroads—Fires—Actions for Injuries—Pleading—Statutes.—Counts in a declaration for causing the death of plaintiff's intestate, alleging that intestate, while exercising due care, was burned to death in attempting to put out a fire on her premises which had spread from combustible material negligently left by defendant railroad on its right of way and ignited from sparks from defendant's locomotive, are not statutory, and therefore bad, because 3 Starr & C. Ann. St. 1896, c. 114, par. 69, relating to the accumulation of combustible material on the right of way of a railway, refers back to the preceding section for a penalty, and applies only to stock, and not to persons, since they do not refer to the statute, and do not depend upon it for their validity.

Same—Questions for Jury.—Before the statute as to allowing the accumulation of combustible material on the right of way of a railway, the question whether the company was negligent in so doing was one of fact, to be determined by the jury under the evidence.

Negligence—Proximate Cause—Question of Law or Fact.—What is the proximate cause of an injury is ordinarily a question of fact for the jury, and is only a question of law or pleading when the facts are not only undisputed, but are also such that there can be no difference in the judgment of reasonable men as to the inferences to be drawn therefrom.

Same—Proximate Cause.*—In order to make a negligent act the proximate cause of an injury, it is not necessary that the particular injury and particular manner of its occurrence could reasonably have been foreseen; but if the consequences follow in unbroken sequence from the wrong to the injury, without an intervening efficient cause, it is sufficient if at the time of the negligence the wrongdoer might by the exercise of ordinary care have foreseen that some injury might result from his negligence.

Railroads—Fires—Proximate Cause.*—Where a railroad company allowed combustible material to accumulate upon its right of

*For the authorities in this series on the question what is, and is not, the proximate cause of an injury, see preceding case and footnotes.

For the authorities in this series on the subject of the liability of a railroad company for personal injuries resulting from fires set by its locomotives, see note, 15 Am. & Eng. R. Cas., N. S., 498, et seq.; Birmingham, etc., Co. *v.* Hinton (Ala.), 17 R. R. R. 173, 40 Am. & Eng. R. Cas., N. S., 173 (proximate cause where plaintiff was burned while escaping from house alleged to have been set on fire through defendant's negligence, sufficiency of complaint); Logan *v.* Wabash Ry.

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way next to intestate's premises, it was bound to anticipate that, if a fire started therein and endangered her property, she would try to put it out; and where a fire started from a spark from defendant's locomotive and spread to intestate's premises, and she, in attempting to extinguish it and while exercising due care, was burned to death, defendant's negligence was the proximate cause of the injury, since it should have anticipated such a result as probable.

Negligence—Fires—Duty of Owner to Protect Property.†—One whose property is exposed to danger by fire caused by another's negligence is bound to make such effort as an ordinarily prudent person would to save it; and if in doing so, and while exercising such care for his safety as is reasonable and prudent under the circumstances, he is injured as a result of the negligence against the effect of which he is seeking to protect his property, the wrongdoer whose negligence is the occasion of the injury is liable in damages.

Appeal—Intermediate Courts—Questions of fact.—The judgment of the Appellate Court, affirming a judgment of the trial court, is final as to controverted questions of fact.

Negligence—Concurrent Causes—Accident.—A defendant is liable for an injury caused to one using due care for his personal safety by the defendant's negligence concurring with an accident without which the injury would not have occurred.

Appeal from Appellate Court, First District, on Appeal from Circuit Court, Crawford County; E. E. Newlin, Judge.

Action by X. F. Siler, as administrator for Mary E. Mullens, deceased, against the Illinois Central Railroad Company, to recover for the death of plaintiff's intestate. From a judgment of the Appellate Court, affirming a judgment for plaintiff, defendant appeals. Affirmed.

On the 11th day of November, 1905, appellee's intestate, Mrs. Mary E. Mullens, having discovered fire among the dry grass and weeds on her premises adjoining appellant's right of way, in order to stop its progress, began raking the leaves between the fire and her house towards the fire, and while doing so her clothing caught fire and she was so badly burned that she died. Her administrator, alleging that the fire was caused by appellant's negligence, brought an action on the case against appellant in the circuit court of Crawford county to recover damages for the injury to the surviving husband and next of kin. He recovered

Co. (Mo.), 6 R. R. R. 274, 29 Am. & Eng. R. Cas., N. S., 279 (proximate cause where personal injuries were sustained when attempting to extinguish the fire); note, 6 R. R. R. 219, 29 Am. & Eng. R. Cas., N. S., 219.

†See second foot-note appended to St. Louis, etc., Co. v. League (Kan.), 17 R. R. R. 772, 40 Am. & Eng. R. Cas., N. S., 772, where all the authorities in this series preceding it are collected.

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a judgment, which was affirmed by the Appellate Court, and an appeal has now been taken to this court.

John G. Drennan (*J. M. Dickinson* and *Parker & Crowley*, of counsel), for appellant.

George W. Jones and *Bradbury & MacHatton*, for appellee.

DUNN, J. Appellant presents two propositions only: First, the declaration does not state a cause of action; second, there is no proof that appellant set out the fire or that the deceased used due care. The declaration consisted of five counts, the second and fifth of which were substantially alike, and alleged that defendant negligently suffered large quantities of combustible material to accumulate upon its right of way; that fire from one of defendant's engines ignited said combustible material, and thence spread and was communicated to the decedent's premises, and while decedent, with all due care and caution for her own personal safety, was endeavoring to suppress said fire and protect her dwelling house on said premises, whose destruction was threatened, her clothing was ignited by said fire, in consequence whereof she was burned and died. The third and fourth counts allege that fire escaped from one of defendant's locomotives by defendant's mere neglect, and set fire to certain combustible material on its right of way and decedent's adjoining close, and while decedent, with all due care for her personal safety, was endeavoring to extinguish the fire and protect her dwelling house, which was threatened with destruction, her clothing was ignited and she was burned, and in consequence thereof died.

It is claimed that the second and fifth counts are statutory, and therefore bad, because the statute in reference to the accumulation of dangerous combustible material upon the right of way of a railroad company (3 Starr & C. Ann. St. 1896, p. 3263, c. 114, par. 69) refers back to the preceding section for its penalty, and applies only to stock, and not to persons. But these counts do not refer to the statute, and do not depend upon it for their validity. Before the statute, while the presence of dry grass and weeds upon the right of way of a railroad company was not conclusive evidence of negligence, yet the question of negligence was one of fact, to be determined by the jury from all the circumstances in the case. *Illinois Central Railroad Co. v. Mills*, 42 Ill. 407.

It is insisted that all the counts are bad because they show specifically that the injury to decedent was not the proximate result of the negligence charged. What is the proximate cause of an injury is ordinarily a question of fact, to be determined by the jury from a consideration of all the attending circumstances. *Fent v. Toledo, Peoria & Warsaw Railway Co.*, 59 Ill. 349, 14 Am. Rep. 13; *Pullman Palace Car Co. v. Laack*, 143 Ill. 242, 32

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N. E. 285, 18 L. R. A. 215; West Chicago Street Railroad Co. v. Feldstein, 169 Ill. 139, 48 N. E. 193. It can only arise as a question of law or pleading when the facts are not only undisputed, but are also such that there can be no difference, in the judgment of a reasonable man, as to the inferences to be drawn from them. The courts all allege, substantially, that the fire was communicated to the decedent's premises by the negligence of appellant. They all allege, substantially, that while the deceased, with all due care for her safety, was trying to extinguish the fire, her clothing was ignited and her burning and death resulted. The question presented, so far as the demurrer is concerned, is whether one who has negligently set fire to another's premises can be held liable for damages caused by burning the owner while engaged in trying, with reasonable prudence and care, to extinguish such fire. Even though one's property has been negligently set on fire by another, the owner cannot permit it to be consumed without an effort to save it and then claim reimbursement from the setter out of the fire. He must use every reasonable effort, consistent with his personal safety, to preserve the property. Toledo, Peoria & Warsaw Railway Co. v. Pindar, 53 Ill. 447, 5 Am. Rep. 57; Chicago & Alton Railroad Co. v. Pennell, 94 Ill. 448. Where a person sees his property exposed to imminent danger through the negligence of another, he is justified in using every effort to save it which a reasonably prudent person would use under similar circumstances, even though the effort exposes him to some danger which he would otherwise have avoided. Due care depends upon the circumstances surrounding the action. It is to be determined with reference to the situation in which he finds himself at the time. What is due care in one situation might be gross recklessness under different circumstances. Every one is bound to anticipate the results naturally following from his acts. The appellant was therefore bound to anticipate, when the fire started, that the decedent would try to put it out. This she was doing, and the allegation is that she was using all due care and caution for her own personal safety. If in so doing the fire which appellant had negligently set out spread to and ignited her clothing without any want on her part of the care which an ordinarily prudent person would exercise under the circumstances, the appellant should be held to have anticipated such result as probable and to be liable therefor.

In order to make a negligent act the proximate cause of an injury, it is not necessary that the particular injury and the particular manner of its occurrence could reasonably have been foreseen. City of Dixon v. Scott, 181 Ill. 116, 54 N. E. 897. If the consequences follow in unbroken sequence from the wrong to the injury without an intervening efficient cause, it is sufficient if, at the time of the negligence, the wrongdoer might, by the

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exercise of ordinary care, have foreseen that some injury might result from his negligence. *Chicago & Alton Railroad Co. v. Pennell*, *supra*; *Pullman Palace Car Co. v. Laack*, *supra*; *Chicago Hair & Bristle Co. v. Mueller*, 203 Ill. 558, 68 N. E. 51. The rule as to what constitutes proximate cause was considered in the case of *Atchison, Topeka & Santa Fé Railroad Co. v. Stanford*, 12 Kan. 354, 15 Am. Rep. 362, and it was said: "Any number of causes and effects may intervene between the first wrongful cause and the final injurious consequence, and, if they are such as might with reasonable diligence have been foreseen, the last result, as well as the first and every intermediate result, is to be considered in law as the proximate result of the first wrong cause. But whenever a new cause intervenes, which is not a consequence of the first wrongful cause, which is not under the control of the wrongdoer, which could not have been foreseen by the exercise of reasonable diligence by the wrongdoer, and except for which the final injurious consequence could not have happened, then such injurious consequences must be deemed too remote to constitute the basis of the cause of action." In *Milwaukee & St. Paul Railway Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256, it is said: "The question always is: Was there an unbroken connection between the wrongful act and the injury—a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? * * * The inquiry must, therefore, always be whether there was any intermediate cause, disconnected from the primary fault, and self-operating, which produced the injury." It is true that in this case the voluntary act of the decedent intervened between the negligent act of the appellant in setting out the fire and the injury occasioned by the burning of decedent. But this act was one of the intervening causes which the appellant with reasonable diligence might have foreseen. It was a consequence of the wrongful act of appellant which it ought to have anticipated. It was not a new and independent cause intervening between the wrong and the injury, or disconnected from the primary cause and self-operating, but was itself the natural result of appellant's original negligence.

The case of *Seale v. Railway Co.*, 65 Tex. 274, 57 Am. Rep. 602, has been cited by appellant and fully sustains its position. That case holds that, whether the deceased was negligent or not in her attempt to put out the fire, it was this attempt, and not the original negligence of the defendant in starting the flame, that was the proximate cause of her death. This case was followed by the Missouri Court of Appeals in *Logan v. Wabash Railroad Co.*, 96 Mo. App. 461, 70 S. W. 734. In the case of *Chattanooga Light & Power Co. v. Hodges*, 109 Tenn. 331, 70 S. W. 616, 60

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L. R. A. 459, 97 Am. St. Rep. 844, the injury resulted from "an act committed by the injured party so obviously fraught with peril as should be sufficient to deter one of reasonable intelligence." The court, while reversing the judgment against the defendant, said: "The rule has been extended so as to give the injured party redress where his effort to save property has been such as a reasonable prudent man would have made under similar circumstances." The cases which sustain the position of the appellant we think are wrong in principle and opposed to the weight of authority. One whose property is exposed to danger by another's negligence is bound to make such effort as an ordinarily prudent person would to save it or prevent damages to it. If in so doing, and while exercising such care for his safety as is reasonable and prudent under the circumstances, he is injured as a result of the negligence against the effect of which he is seeking to protect his property, the wrongdoer whose negligence is the occasion of the injury must respond for the damages. It is not just that the loss should fall on the innocent victim. We regard this as the result of the authorities which we have been able to examine, aside from the two above mentioned as sustaining the position of appellant. *Berg v. Great Northern Railway Co.*, 70 Minn. 272, 73 N. W. 648, 68 Am. St. Rep. 524; *Liming v. Illinois Central Railroad Co.*, 81 Iowa, 246, 47 N. W. 66; *Glanz v. Chicago, Milwaukee & St. Paul Railway Co.*, 119 Iowa, 611, 93 N. W. 575; *Wasmer v. Delaware, Lackawanna & Western Railroad Co.*, 80 N. Y. 212, 36 Am. Rep. 608; *Page v. Bucksport*, 64 Me. 51, 18 Am. Rep. 239.

The declaration was sufficient to support the judgment. There was evidence tending to show that appellant had allowed dry grass and weeds to accumulate upon its right of way; that the fire started in such grass and weeds, and spread to the deceased's premises, immediately after the passage of a gravel train of appellant; that the deceased commenced to rake the grass and leaves on her lot and near her house, and while doing so her clothes caught fire; that the fire was started by the negligence of appellant; and that the deceased exercised ordinary care, under the circumstances, for her own safety. In this condition of the record, the judgment of the Appellate Court is final as to the facts.

Appellant insists that, if the deceased was not guilty of contributory negligence, she was injured as the result of a pure accident. But the law is well settled in this state that a defendant is liable for an injury caused to one using due care for his personal safety by the defendant's negligence concurring with an accident without which the injury would not have occurred. *City of Rock Falls v. Wells*, 169 Ill. 224, 48 N. E. 440; *City of Joliet v. Shufeldt*, 144 Ill. 403, 32 N. E. 969, 18 L. R. A. 750, 36 Am.

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St. Rep. 453; Village of Carterville v. Cook, 129 Ill. 152, 22 N. E. 14, 4 L. R. A. 721, 16 Am. St. Rep. 248; Armour v. Golkowska, 202 Ill. 144, 66 N. E. 1037.

We find no error in the record, and the judgment will be affirmed.

Judgment affirmed.

BEAULIEU v. GREAT NORTHERN RY. CO.

(Supreme Court of Minnesota, Dec. 27, 1907.)

[114 N. W. Rep. 353.]

Damages—Contract—Breach—Willful Tort—Mental Anguish.*—Damages for mental anguish can be recovered in an action for breach of contract only in those exceptional cases where the breach amounts, in substance, to an independent willful tort.

Carriers—Transportation of Corpse—Breach of Contract—Negligence—Damages—Mental Anguish.*—In an action for damages for breach of contract by a railway company to transport a corpse over its line to a particular point, delivering it there to an intersecting carrier to be conveyed to its place of destination, the breach consisting in the negligence of the company's agents and servants in carrying the corpse beyond the connecting point, thus causing a delay of 24 hours in the funeral arrangements, it is held that, in the absence of willful or malicious misconduct on the part of the company or its agents, damages for mental anguish cannot be recovered.

Same—Complaint—Nominal Damages.—The complaint construed, and held not to state a cause of action within this rule, though it does state a cause of action for nominal damages.

Jaggard, J., dissenting.

(Syllabus by the Court.)

Appeal from District Court, Red Lake County; William Watts, Judge.

Action by Jennie D. Beaulieu against the Great Northern Railway Company. From an order overruling defendant's demurrer to the complaint, it appeals. Affirmed.

*See first foot-note appended to Southern Pac. Co. v. Hetzer (C. A.), 17 R. R. R. 724, 40 Am. & Eng. R. Cas., N. S., 724, where all the authorities on the subject in this series preceding it are collected; foot-notes appended to Missouri, etc., Ry. Co. v. Welch (Tex.), 25 R. R. R. 700, 48 Am. & Eng. R. Cas., N. S., 700; foot-notes appended to Bahr v. Northern Pac. Ry. Co. (Minn.), 24 R. R. R. 782, 47 Am. & Eng. R. Cas., N. S., 782; Lindsay v. Oregon Short Line R. Co. (Idaho), 24 R. R. R. 616, 47 Am. & Eng. R. Cas., N. S., 616; Chicago, etc., Co. v. Schritter (Ill.), 24 R. R. R. 442, 47 Am. & Eng. R. Cas., N. S., 442.

*Beaulieu v. Great Northern Ry. Co**M. L. Countryman*, for appellant.*W. E. Dodge* and *Wm. A. Tautges*, for respondent.

BROWN, J. Defendant interposed a general demurrer to the complaint in this action, and appealed from an order overruling the same.

The complaint alleges, in substance, that plaintiff's child, aged three and one-half years, died at Cass Lake, and plaintiff desired that the body should be buried at Ogahmah. The body was accordingly prepared for burial, and delivered to defendant for shipment to that place. The shipment required a transfer of the casket containing the body at Erskine, where the defendant's road connects with the Soo Line, over which the plaintiff and the corpse were to reach Ogahmah. The complaint further alleges that it was the duty of defendant to put the corpse off its trains at said Erskine, to the end that it might be transferred to the Soo train, but that, instead of doing so, its servants and agents wrongfully and unlawfully retain possession thereof, and "negligently, wrongfully and unlawfully, and with utter disregard of the rights and feelings of plaintiff," carried the corpse beyond that station, and to the city of Crookston, thus delaying the funeral arrangements for 24 hours; that, by reason of this delay, the corpse became badly "decayed, mutilated, and damaged." As to the nature and character of the injury and damage to plaintiff, it alleges: "That said funeral was to take place at White Earth on the 21st day of July, 1906, at 3 o'clock p. m., as stated, and at said time and place the plaintiff had her priest and mourners in attendance, but, by reason of the premises, said funeral and burial could not take place at said time, causing this plaintiff great annoyance and damage. That, by reason of the said neglect, wrongful, and unlawful acts of said defendant, this plaintiff has been greatly damaged, and has been greatly outraged in her feelings, and has suffered great distress of mind and great mental pain and anguish, and has become sick and nervous, and will continue to suffer great mental pain and anguish in the future, all to the plaintiff's damage in the sum of \$3,000." The complaint charges no willful or intentional misconduct on defendant's part, or on the part of its agents, no claim is made for actual damages, and the allegations thereof, taken as a whole, show only a failure to transport the corpse of plaintiff's child to Erskine, leaving it there for reshipment over the other line to the place of destination, in accordance with its contract. The principal question for consideration, therefore, is whether on the facts stated a recovery may be had for the mental suffering endured by plaintiff in consequence of defendant's neglect.

The question whether mental anguish is a proper element of damages, either in actions in tort or for a breach of contract, has been presented to the courts in numerous cases, and there is much

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conflict of opinion upon the subject. According to the weight of authority, such damages may be recovered in all actions in tort where the plaintiff has suffered physical injury at the hands of the defendant, whether from malice or mere negligence. (6 Current Law, 631, 8 Am. & Eng. Ency. Law, 658); also in that class of torts where the plaintiff is subjected to some indignity, as in libel, slander, malicious prosecution, or seduction (8 Am. & Eng. Ency. Law, 668; 13 Cyc. 44); and, again, in those willful wrongs where some legal right has been invaded, though no physical injury is inflicted or character or reputation assailed (*Lesch v. Railway Co.*, 97 Minn. 503, 106 N. W. 955; *Purcell v. Railway Co.*, 48 Minn. 134, 50 N. W. 1034, 16 L. R. A. 203; *Sanderson v. Railway Co.*, 88 Minn. 162, 92 N. W. 542, 60 L. R. A. 403, 97 Am. St. Rep. 509). But such damages are not recoverable in all actions in tort. Broadly stated, their allowance is limited to actions where the plaintiff has received some injury to his person, or some legal right has been invaded of a nature naturally to cause grief and distress of mind. None of the cases, as we read them, go beyond these limits. They are not recoverable in actions for death by the wrongful act of another. *Hutchins v. Railway Co.*, 44 Minn. 5, 46 N. W. 79; *Blake v. Railway Co.*, 18 Q. B. 93; *Donaldson v. Railway Co.*, 18 Iowa, 280, 87 Am. Dec. 391; *Munroe v. Pacific Coast*, 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248. Nor in actions for libeling the dead. *Bradt v. New Nonpareil Co.*, 108 Iowa, 449, 79 N. W. 122, 45 L. R. A. 681, 25 Cyc. 426. Nor in actions for injuries to a minor child. *Sperier v. Ott*, 116 La. 1087, 41 South. 323, 7 L. R. A. (N. S.) 518, 114 Am. St. Rep. 587, and cases cited in note; *Flemington v. Smithers*, 2 Car. & P. 292; *Bube v. Birmingham Light Co.*, 140 Ala. 276, 37 South. 285, 103 Am. St. Rep. 33; *Black v. Carrollton Railway Co.*, 10 La. Ann. 33, 63 Am. Dec. 586; *Hartford Co. v. Hamilton*, 60 Md. 340, 45 Am. Rep. 739; *Railway Co. v. Barker*, 33 Ark. 350, 34 Am. Rep. 44. In *State ex rel. v. Railway Co.*, 24 Md. 84, 87 Am. Dec. 600, an action by a mother for the wrongful death of her son, in which she claimed the right to recover for mental anguish in addition to compensatory damages, the court said: "According to appellant's theory, the mother and son are supposed to live together to an indefinite age; the one craving sympathy and support, the other rendering reverence, obedience, and protection. Such pictures of filial piety are estimable moral examples, beautiful to contemplate; but the law has no standard by which to measure their loss." Loss of support or loss of services is the gist of actions last referred to and compensatory damages only are recoverable, and it is immaterial whether the act complained of was willful and malicious, or merely the result of negligence. There may be other exceptions to the general rule mentioned, as applied to action *ex delicto*, but we are not concerned with them at this time.

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It is also a rule of general application that mental anguish is not a proper element of damage in actions for breach of contract, though there is a class of wrongs arising out of contractual relations in which this element is permitted to enter. Illustrations of this are found in willful and unlawful injuries to passengers upon railroad trains. There is in such cases a contract by the railroad company to carry safely the passenger to his destination, and an implied legal obligation to protect him within certain limits while the relation of passenger and carrier exists, and the courts declare that willful or malicious violation of that duty constitutes an independent tort, for which recovery may be had for the indignity to which the passenger is subjected. *Mykleby v. Railway Co.*, 39 Minn. 34, 38 N. W. 763; *Brown v. Railway Co.*, 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41; *Walsh v. Railway Co.*, 42 Wis. 23, 24 Am. Rep. 376; *Cracker v. Railway Co.*, 36 Wis. 657, 17 Am. Rep. 504. An exception is also made of actions for breach of promise to marry. But such actions in all essential respects partake of the nature of torts, and are so treated by the courts. *Johnson v. Travis*, 33 Minn. 331, 22 N. W. 624; *Thorn v. Knapp*, 42 N. Y. 474, 1 Am. Rep. 561; *Smith v. Woodfine*, 87 E. C. L. 660; *Coll v. Wallace*, 24 N. J. Law, 291; 5 Cyc. 1021. The rule that damages of this nature may be recovered in an action for a breach of contract properly to send and deliver a telegram has become the settled law in a number of the states, following the lead of Texas. But a majority of the courts do not concur in that doctrine. 63 Cent. Law J. 340; 1 A. & E. Ann. Cases, 355, note. This court declined to follow it in *Francis v. Tel. Co.*, 58 Minn. 252, 59 N. W. 1078, 25 L. R. A. 406, 49 Am. St. Rep. 507, where the rule laid down in the leading English case of *Hadley v. Baxendale*, 9 Exch. 341, was approved and followed. But it would be unprofitable to prolong this opinion by an extended discussion of the general subject. Summarizing, it may be said that mental anguish is a proper element of damages in all actions sounding in tort, where the plaintiff has received some physical injury, or his legal rights have been so willfully invaded as naturally to cause mental distress. It is an element to be considered in actions for a breach of contract in exceptional cases only; the principal exception being the telegram cases already referred to. And we pass to a consideration of the question whether this case comes within any of the exceptions.

In respect to the wrongful interference with the rights of preservation and burial of the dead, the courts are again somewhat at variance. Though the common law recognizes no property in the bodies of deceased persons (*Weld v. Walker*, 130 Mass. 422, 39 Am. Rep. 465; *Reg v. Sharpe*, 7 Cox. C. C. 214), a right of possession and preservation for burial purposes is conceded by

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nearly all the authorities, which the law will protect (*Rex v. Fox*, 2 Q. B. 246; *Williams v. Williams*, 20 Ch. Div. 659; *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370; 3 Am. & Eng. Ann. Cases, 132, note). And any willful or wrongful interference with that right by the intentional mutilation or secretion of the body subjects the wrongdoer to an action on the case, in the determination of which mental anguish is a proper element for consideration in assessing damages. The law on the subject, so far as it relates to actions in torts, is completely summed up by Mr. Justice Michell in *Larson v. Chase*, *supra*. It was said in that case: "But this whole subject is only obscured and confused by discussing the question whether a corpse is property in the ordinary commercial sense, or whether it only has value as an article of traffic. The important fact is that the custodian of it has a legal right to its preservation and burial, and that any interference with that right by mutilation or otherwise disturbing the body is an actionable wrong." That has become one of the leading cases on the subject in this country, and has been cited with approval and followed and applied in other states. *Burney v. Children's Hospital*, 169 Mass. 58, 47 N. E. 401, 38 L. R. A. 413, 61 Am. St. Rep. 273; *Koerber v. Patek*, 123 Wis. 453, 102 N. W. 40, 68 L. R. A. 956; *Foley v. Phelps* (Sup.) 37 N. Y. Supp. 471; *Hackett v. Hackett*, 18 R. I. 155, 26 Atl. 42, 19 L. R. A. 558, 49 Am. St. Rep. 762; *Louisville v. Wilson*, 123 Ga. 62, 51 S. E. 24. The contrary doctrine is upheld by plausible argument in *Long v. Railway Co.*, 15 Okl. 512, 86 Pac. 289, 6 L. R. A. (N. S.) 883, in which the cases holding to the view that no action will lie in such cases, either in tort or for breach of contract, are cited. The rule laid down in the *Larson Case* expresses the modern view of the question, and extends a remedy where otherwise none would exist. There being no property in dead bodies, and the wrong complained of being only the invasion of an intangible legal right, no actual damages for the wrongful mutilation of the body can be recovered, and the courts award solatium for the bereavement of the next of kin as the only appropriate relief. Without the element of mental distress, the action would be impotent of results and of no significance or value as a remedy for the tortious violation of the legal right of possession and preservation. 7 Cur. Law, 9, 54. But that rule can on principle have no application to actions for breach of contract. A breach of contract involves only such consequences as directly result therefrom and were within the contemplation of the parties when the contract was made, and which may be measured and determined by some definite rule or standard of compensation. While the rule of compensation to the injured party controls the measure of damages both in actions *ex contractu* and *ex delicto*, the elements proper to be considered are

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in some respects widely different in the two classes of cases. In actions sounding in tort, exemplary or punitive damages are as a general rule awarded, in the discretion of the jury. *McCarthy v. Niskern*, 22 Minn. 90; *Peck v. Small*, 35 Minn. 465, 29 N. W. 69; 12 Am. & Eng. Ency. Law, 13. But they are compensatory in theory only. Such damages are not recoverable in actions for breach of contract, except, perhaps, in those exceptional cases where the breach amounts to an independent willful tort, in which event they may be recovered under proper allegations of malice, wantonness, or oppression. 12 Am. & Eng. Ency. Law, 20; *North v. Johnson*, 58 Minn. 242, 59 N. W. 1012. They cannot be recovered in actions involving ordinary negligence, where no physical injury results. *Railway Co. v. Shanks*, 94 Ind. 598; *Railway Co. v. Scurr*, 59 Miss. 456, 42 Am. Rep. 373; *Gibney v. Lewis*, 68 Conn. 392, 36 Atl. 799; *Railway Co. v. Arms*, 91 U. S. 489, 23 L. Ed. 374; *Chicago v. Martin*, 49 Ill. 241, 95 Am. Dec. 590. Exemplary damages are incapable of definite ascertainment; and, though classed theoretically as compensatory, they are, in fact, imposed in the nature of punishment for the wrong complained of, and the amount rests in the sound judgment of the jury. Mental grief from a pecuniary standpoint is just as incapable of definite calculation as exemplary damages. The law furnishes no standard by which it may be valued, the amount awarded in any particular case must necessarily rest in the discretion of the jury, and recovery therefor should on principle be confined to those cases where punitive damages are allowed. In Texas, Kentucky, North Carolina, and perhaps other states, where the so-called "Texas doctrine" in the telegraph cases has met with approval, it is held that in an action for breach of contract concerning the burial of the dead mental anguish may properly be considered by the jury in the assessment of damages to the aggrieved party. *Railway Co. v. Hull*, 113 Ky. 561, 68 S. W. 433, 57 L. R. A. 771; *Hale v. Bonner*, 82 Tex. 33, 17 S. W. 605, 14 L. R. A. 336, 27 Am. St. Rep. 850; *Renihan v. Wright*, 125 Ind. 536, 25 N. E. 822, 9 L. R. A. 514, 21 Am. St. Rep. 170. Those cases follow logically the Texas rule in the telegraph cases. But wherever the Texas rule has been repudiated as an innovation upon elementary principles of the common law, the courts have, in our view, consistently reached the opposite conclusion. The cases are collected and the subject discussed in 5 Col. Law Rev. 179, and in 1 A. & E. Ann. Cas. 355. The extreme to which this rule leads is illustrated in two North Carolina cases. A father sent a telegram to a friend at a distant point, stating that his daughter, 16 years of age, was on her way to visit at this home, and requesting the friend to meet her at the train, which arrived about 12 o'clock at night. Through the negligence of the company's agent, the message was not delivered, and no one met the daughter

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upon her arrival at the station. The conductor of the train placed her in charge of an employee of the railroad company, who procured a carriage, and she was taken to the friend's house, safe and sound, except for her mental anguish and worry. She brought an action for damages against the telegraph company, alleging as ground of recovery her mental distress. The father also sued for mental anguish which he suffered when told the next day of the failure to deliver the telegram. The court sustained the right of action in each case. *Green v. Telegraph Co.*, 136 N. C. 489, 49 S. E. 165, 6 L. R. A. 985, 103 Am. St. Rep. 955; *Green v. Telegraph Co.*, 136 N. C. 506, 49 S. E. 171. These cases are not open to criticism, except to the extent the doctrine upon which they are founded is subject to adverse comment. They follow logically and consistently the "Texas doctrine" and emphasize, in our opinion, the *reductio ad absurdum* of that rule. Efforts have been made to induce the courts of some jurisdictions to apply that doctrine in various forms of action for breach of contract. In *Eller v. Railway Co.*, 140 N. C. 140, 52 S. E. 305, 3 L. R. A. (N. S.) 225, damages were sought for mental anguish for the breach of a contract to furnish a wedding trousseau, by reason of which plaintiff was subjected to mortification, humiliation, and mental distress. The court rejected the claim. Damages were sought in *Railway Co. v. Dalton*, 65 Kan. 661, 70 Pac. 645, for negligently carrying plaintiff by the station of his destination, but the court held that distress of mind was not subject of compensation for a breach of contract of that nature. See, also, *Wilcox v. Railway Co.*, 52 Fed. 264, 3 C. C. A. 73, 17 L. R. A. 804; *Railway Co. v. Deloney*, 65 Ark. 177, 45 S. W. 351, 67 Am. St. Rep. 913.

But, without further citation of authorities or discussion of the subject from the standpoint of decisions of other courts, we turn to our own decisions, and find that the question has been definitely settled by this court in *Francis v. Telegraph Co.*, 58 Minn. 252, 59 N. W. 1078, 25 L. R. A. 406, 49 Am. St. Rep. 507, wherein we declined to follow the Texas rule. The question was fully considered in that case, and the conclusion reached that in actions for breach of contract to transmit and deliver a telegram mental anguish occasioned by the breach furnished no proper basis for the recovery of damages. The difference between actions in tort, and those for breach of contract is pointed out with clearness by Mr. Justice Mitchell, who wrote the opinion. The rule therein announced and applied has the sanction of the elementary principles of the law of damages, and is approved by a majority of the courts of this country. In addition to the cases heretofore referred to, we cite *Chapman v. Telegraph Co.*, 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183; *Telegraph Co. v. Rogers*, 68 Miss. 748, 9 South. 823,

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13 L. R. A. 859, 24 Am. St. Rep. 300; *Connell v. Telegraph Co.*, 116 Mo. 34, 22 S. W. 345, 20 L. R. A. 172, 38 Am. St. Rep. 575. "The law looks," Judge Mitchell remarked, "only to the pecuniary value of a contract, and for its breach awards only pecuniary damages." And the court applied the general rule that in such actions damages must be limited to the actual pecuniary loss naturally and necessarily flowing from the breach. The logic of that decision applies to the case at bar. The complaint before us charges, at most, a negligent failure to perform the contract, for the breach of which damages for mental anguish are demanded, and the case is not brought within those wherein such damages are awarded for the malicious and wanton breach, to which we have adverted. 13 Cyc. 44-45. Of this class *Lindh v. Railway Co.*, 99 Minn. 408, 109 N. W. 823, 7 L. R. A. (N. S.) 1018, is an example. In that case we did not intend to be understood as holding that mental anguish was a proper element of damages in an action for the failure of a common carrier safely to transport a corpse to its destination in accordance with its contract. The injuries there complained of were treated as a willful tort distinct from the contract, and the conclusion reached is in harmony with *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370. If damages for mental anguish may not be recovered in actions wholly in tort, where the parent suffers untold grief at the disfigurement of his minor child, or because of his death by the wrongful act of another, or in actions for libeling the dead, as indicated by the authorities cited, by what course of reasoning, from the view point of legal principles uninfluenced by feelings of sentiment or resentment, can it be held that they may be recovered, in an action like that at bar, for the mere negligence of a railroad company in carrying a corpse beyond the station of its destination, resulting in no injury to the body, save such as arises from its natural tendency to decomposition? We discover none.

It is urged that damages of this character in actions upon contract, as well as in tort, find support in the declaration of the fundamental law that there shall be a certain remedy for all wrongs, and that, if they be denied in breach of contract actions, the guaranteed remedy is denied. This is plausible, but not persuasive. The maxim, "*ubi jus ibi remedium*," has, like other principles of the law, its limitations. The guaranty of a remedy for all wrongs has more particular reference to wrongs of a substantial nature, where property or character is affected, rather than to those founded wholly in sentiment. It protects property and property rights, persons, domestic relations, character, and reputation, but not necessarily grief and mental distress occasioned by some unintentional act of wrongdoing. As remarked by the Supreme Court of Indiana in *Telegraph Co. v. Ferguson*,

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157 Ind. 69, 60 N. E. 674, 1080, 54 L. R. A. 846, the maxim that for every wrong there should be a remedy, as applied to actions for damages for breach of contract, was intended by the "fathers of the common law to include such damages as the courts, dealing practically with the practical affairs of life, can find to be certain and measurable from evidence the source of which is open to both parties, and the nature not transcendental." Other instances where the common law has not afforded a remedy in apparently meritorious cases are numerous, chief among which is the remedy for death by wrongful act first given in England by Lord Campbell's act, and followed by statutory enactments in this country. Without a statute providing a remedy in that class of wrongs, no action could be maintained by the relatives of the deceased for compensatory or other damages. So, in cases like that at bar, the remedy should come from legislation, and not by judicial decisions out of harmony with established principles of the law. *Telegraph Co. v. Ferguson*, 157 Ind. 64, 60 N. E. 674, 1080, 54 L. R. A. 846.

For these reasons, we conclude that plaintiff is not entitled to recover for her mental anguish. Her complaint, however, charges a breach of contract, and she would be entitled at least to nominal damages, and the court below properly overruled the demurrer.

Order affirmed.

GATES *v.* NORTHERN PAC. RY. CO. *et al.*

(Supreme Court of Montana, March 28, 1908.)

[94 Pac. Rep. 751.]

Negligence—Places Attractive to Children—Liability of Owner.*—

In an action against a railroad for the death of a child 11 years old while on the railroad property, attracted thereto by a car deposited bottom side up on the slope of an embankment, caused by the car falling on him, plaintiff must allege and prove that the child was too

*For the authorities in this series on the subject of the negligence of railroad companies in maintaining things dangerous and attractive to children, and in failing to warn them of the danger, etc., see foot-notes appended to *Kansas City, etc., R. Co. v. Matson* (Kan.), 12 R. R. 675, 35 Am. & Eng. R. Cas., N. S., 675, where all those preceding it are collected or referred to; foot-notes appended to *Hamilton v. Detroit, etc., Ry. Co.* (Mich.), 22 R. R. R. 669, 45 Am. & Eng. R. Cas., N. S., 669; *Walker's Adm'r v. Potomac, etc., R. Co.* (Va.), 22 R. R. R. 646, 45 Am. & Eng. R. Cas., N. S., 646; foot-notes appended to *Denver, etc., Co. v. Nicholas* (Colo.), 22 R. R. R. 523, 45 Am. & Eng. R. Cas., N. S., 523; *Louisville Ry. Co. v. Esselman* (Ky.), 20 R. R. R. 627, 43 Am. & Eng. R. Cas., N. S., 627.

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young to appreciate the danger; that the death was caused by a dangerous thing attractive to children; that the railroad knew, or, in the exercise of ordinary care, ought to have known, that children would be attracted by the car.

Brantly, C. J., dissenting.

Appeal from District Court, Missoula County; Henry L. Myers, Judge.

Action by A. M. Gates against the Northern Pacific Railway Company and another. From a judgment for plaintiff, defendants appeal. Reversed and remanded for new trial.

Wallace & Donnelly, for appellants.

Hall & Patterson, for respondent.

SMITH, J. The following statement of the facts in this case is adopted from the brief of the appellant, supplemented by certain suggestions made by the respondent: This action was brought by plaintiff in Missoula county to recover damages for the death of his 11 year old son, Amos Gates, who was killed on the afternoon of June 14, 1906. On June 13, 1906, the defendant Heaney was in the employ of the defendant railway company at Missoula as foreman of a crew of men employed in the yards. Some time during the forenoon of that day the men under his charge took the body or wooden part of a worn-out coal car to a point on the main line of the railway several hundred feet east of the passenger station, but within the yard limits, and left it at the side of the track, intending later to burn it. The iron braces and rods were still on the car, but not the wheels. It looked topheavy—as though it would easily tip over. The railroad track at the point where the car was left rests upon a fill or embankment, the top of which is 20 feet above the level of the ground on either side; the sides of the fill sloping outwardly from the track to the level ground below. When the car was first deposited on the bank, it rolled down further than the employees expected that it would, and they hauled it back to the point where it was finally left, so that, when it burned, no damage would be done to other property. The car was left bottom side up on the north slope of, and about half way down, the fill. Between 2 and 3 o'clock in the afternoon of the next day the deceased, in company with his twin brother, Elihu, and a still younger brother, was standing on the defendant's right of way, near the bottom of the fill, looking at the car. The children started from the house of one Graham to go to a certain frog pond to swim, when they saw the car and went down to see it. Elihu testified: "We seen this car up there on the bank, and it called our attention, and we hurried over there." It appears that, in addition to the swimming pond, there was a certain lumber yard somewhere in the vicinity of the defendant company's

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ground to which a path led across the right of way. When the boys first observed the car, they were in the path; but turned out of it, and went to the foot of the fill to look at the car. There was another path or trail directly under the car, but this was not the one the boys were traversing when their attention was first attracted to the car. These paths had been in existence for several years, and had been used by persons crossing the track. Between the time when the car was left on the embankment and the time of the accident 32 trains of the defendant company passed the spot. The last of these trains by its vibration caused the car to roll down the bank upon the child Amos, causing his death. Elihu caught his younger brother, and drew him out of danger. Elihu testified that the car "looked kind of queer to be perched up on the side of the grade with the bottom up." Missoula is a city of about 8,000 people. The accident occurred within the city limits, at a point where the right of way was open and not fenced off from the streets. Prior to the boy's injury two men had gone on the right of way to look at the car. One testified: "I was curious about it, whether the car had been dumped off the track, or whether it had been thrown off. I walked over and took a look at the car. It was out of curiosity, because it was an unusual thing for them to dump a car around there. I believe they had burned one before that. It was not the unusual appearance of the car that caused me to go over to look at it. It was an unusual thing for a car to be dumped there." The other said: "Going down that way at noon, I noticed this car lying in a position. It was standing up and down the bank, and, of course, I wondered how much of a push it would take to push it down. Didn't pay any further attention, noticed the position it was lying in on the side of the bank." In addition to the foregoing, one Storer testified: "Walked past the car on the day before the accident. It was set up on edge, on the side of the embankment on the north side of the railroad track; set down on the edge of the grade. I thought it would be easily pushed over or pushed down: wondered it did not fall, and thought I would not like to walk down under it, anything of that kind; thought it might fall on a man pretty easy. I did not pay much attention to it any more than I just stopped and looked at it." At the close of plaintiff's case defendants moved for a nonsuit upon the following grounds:

"(1) That it appears from the evidence, and it is admitted by the plaintiff in his reply, that at the time when the deceased was killed he was upon the premises of the defendant railway company.

"(2) That there is nothing to show, nor is it alleged, that the defendant knew that the deceased was exposed to any peril, or that they knew of his presence upon the premises of the railway company; and, under the decision in the case of *Driscoll v. Clark*,

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32 Mont. 172, 80 Pac. 1, 373, there could be no recovery even if the defendants had known of his peril, or known of his presence upon the premises of the railway company, or possessing such information had neglected to inform him.

"(3) That, while it is alleged in the complaint that the car or the body of the car that was thrown upon and caused the death of deceased was especially alluring and attractive to children, there is no evidence in this case that it was especially or at all attractive or alluring to children, or that the vicinity of said car was frequented by children; nor is there any evidence that the defendants or either of them knew or had reason to suppose that children were or would be attracted by the presence of said car upon the right of way of defendant railway company.

"(4) That it has not been made to appear that the deceased was incapable of appreciating whatever danger there was from the presence of the car upon the embankment.

"(5) The evidence directly shows that the deceased did not go in the vicinity of the car because allured or attracted thereto, but he and his brothers went there for the purpose of procuring wood.

"(6) There is no pleading in this case sufficient to sustain a recovery on the theory that the deceased was rightfully on defendant railway company's land by either invitation or license.

"(7) There is no evidence sufficient to warrant a recovery on the last-named theory."

This motion was overruled. The jury returned a verdict for the plaintiff, and the court entered judgment on the verdict. From that judgment, and also from an order denying a new trial, defendants appeal.

At the outset we may eliminate from consideration the matters contained in paragraph 5 of the motion for a nonsuit, because, in our judgment, the evidence fails to show that the boy who was killed went upon the right of way at this particular time for the purpose of procuring wood.

The following is the respondent's contention in his printed brief: "The plaintiff is entitled to recover under either of the following theories: (1) Though Amos M. Gates, deceased, was a trespasser, the plaintiff is entitled to recover upon the ground that defendants willfully, recklessly, and wantonly left said car in its condition, position, location, and situation that the child's death, was caused by the wilful, wanton, or reckless acts of defendants. (2) That the car in its condition, position, location, and situation was so especially unusually calculated to allure and attract children and Amos M. Gates, deceased, that he came to the place of injury by the invitation of defendants."

The appellants contend that the court erred in denying the motion for a nonsuit, and in overruling their motion for a new

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trial. No claim is made that the parents of the child were negligent, and no fault is found with the instructions given to the jury. The appellants present the case thus: "By the record in this case there is presented the question how far the doctrine of the so-called 'turntable cases' is to be extended and applied in this court." The respondent in the quotation from his brief heretofore made seems to base his right to recover upon two different propositions or theories. He cites no cases in support of what may be termed his first contention, except *Driscoll v. Clark*, 32 Mont. 172, 80 Pac. 1, 373, where this court held that the complainant should have alleged either that there was an actual invitation to children to play about the machinery, or that it was so especially and unusually attractive to them that it constituted an implied invitation; and the case of *Egan v. Montana Central Ry. Co.*, 24 Mont. 569, 63 Pac. 831, where it was decided that the defendants owed to the plaintiff, as they did to any other trespasser, the duty to refrain from any willful or wanton act occasioning injury. His second contention seems to be that he is entitled to recover by application of the doctrine of the so-called "Turntable Cases" as laid down by the Supreme Court of the United States in *Railroad Co. v. Stout*, 17 Wall. (U. S.) 657, 21 L. Ed. 745. In support of the latter position he has cited numerous cases, and we have examined many others not found in the briefs. No good reason can be seen for an extended discussion of the particular cases. A very comprehensive and able review of them is found in the case of *Wheeling, etc., Railroad Co. v. Harvey*, 83 N. E. 66, decided December 3 last by the Supreme Court of Ohio. Mr. Thompson, in the first volume of his *Commentaries on the Law of Negligence*, Edition of 1901, § 1030, says: "We now come to a class of decisions which hold the landowner liable in damages in the case of children injured by dangerous things suffered to exist unguarded on his premises where they are accustomed to come with or without license. These decisions proceed on one or the other of two grounds: (1) That where the owner or occupier of grounds brings or artificially creates something thereon which from its nature is especially attractive to children, and which at the same time is dangerous to them, he is bound, in the exercise of social duty and the ordinary offices of humanity, to take reasonable pains to see that such dangerous things are so guarded that children will not be injured by coming in contact with them. (2) That although the dangerous things may not be what is termed an attractive nuisance—that is to say, may not have an especial attraction for children by reason of their childish instincts—yet where it is so left exposed that they are likely to come in contact with it, and where their coming in contact with it is obviously dangerous to them, the person so exposing the dangerous thing should reasonably antic-

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ipate the injury that is likely to happen to them from its being so exposed, and is bound to take reasonable pains to guard it as to prevent injury to them." At the trial of the "Turntable Case," (*Stout v. Sioux City & Pac. R. R. Co.*, 2 Dill. 294, Fed. Cas. No. 13,504), Judge Dillon charged the jury as follows: "In the first place, it is alleged in the petition, and it must appear by the evidence, that this turntable, in the condition, situation, and place where it then was, was a dangerous machine, one which, if left unguarded or unlocked, would be likely to cause injury to children. You have heard described the manner in which this turntable was constructed and left, and very much evidence has been adduced to show that turntables are constructed and left in this manner elsewhere; and the evidence is quite undisputed that it is not the practice of railroads to guard or lock them. The circumstance that other roads throughout the country do not guard or fasten turntables (if you find such to be the fact) is not conclusive in the defendant's favor that there was or could be no negligence on its part as respects the turntable in question; but, while not conclusive, it is still a very important fact or circumstance to be considered by the jury in determining the question of the defendant's negligence. This action rests, and rests alone, upon the alleged negligence of the defendant, and this negligence consists, as alleged, in not keeping the turntable guarded or locked. Negligence is the omission to do something which a reasonable, prudent man, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent or reasonable man would not do, under all the circumstances surrounding the particular transaction under judicial investigation. If the turntable, in the manner it was constructed and left, was not dangerous in its nature, then, of course, the defendants would not be guilty of any negligence in not locking or guarding it. But, even if it was dangerous in its nature in some situations, you are further to consider whether, situated at it was on the defendant's property, in a small town, and distant or somewhat remote from habitations, the defendants are guilty of negligence in not anticipating or foreseeing, if left unlocked or unguarded, that injuries to the children of the place would be likely to or would probably ensue. The machine in question is part of the defendant's road, and was lawfully constructed where it was. If the railroad company did not know, and had no good reason to suppose, that children would resort to the turntable to play, or did not know, or had no good reason to suppose, that, if they resorted there, they would be likely to get injured thereby, then you cannot find a verdict against them. But if the defendant did know, or had good reason to believe, under the circumstances of the case, the children of the place would resort to the turntable to play, and that, if

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they did, they would or might be injured, then, if they took no means to keep the children away, and no means to prevent accidents, they would be guilty of negligence, and would be answerable for damages caused to children by such negligence. Counsel for the defendant disclaim resting their defense on the ground that the plaintiff's parents were negligent, or that the plaintiff (considering his tender age) was negligent, but rest their defense upon the ground that the company was not negligent, and claim that the injury to the plaintiff was accidental, or brought upon himself. The defendants are not insurers of the limbs of those, whether adults or children, who may resort to their grounds; and there are many injuries continually happening which involve no pecuniary liability to any one. To find against the defendant you must find that it has been guilty of neglect, of a wrong, of a want of due and proper care in the construction of machinery of a dangerous character, and, so leaving it exposed, as before explained, that, as reasonable men, the officers of the road ought to have foreseen that an accident, happening as this happened, would probably occur, or be likely to happen." The Supreme Court of the United States said: "The charge was in all respects sound and judicious." Many courts have followed the Stout Case, and others have refused to do so. The doctrine there laid down has in some instances been strictly limited to cases of attractive and dangerous machinery, and in others it has been extended until its ramifications are almost limitless. I can see no reason why, if the doctrine of the "turntable cases" is adopted at all, it should not be extended to those cases, not involving turntables, which come within the principles upon which the Stout Case rests. Some of the decided cases seem to fall within Mr. Thompson's first class and some within the second, while others appear to belong partly to one and partly to the other. It may be said, under the rule laid down in *Driscoll v. Clark*, *supra*, the plaintiff here did not make out a cause of action, because, while he alleged that the car was especially attractive to children, his only proof was that children were attracted to it at the time of the accident. If we follow the rule in *Driscoll v. Clark*, to its logical end, the fact that these children were attracted is insufficient to prove that the car was peculiarly and unusually attractive to children, especially in view of the fact, as proven, that adults were also attracted to look at it. The writer of this, however, is of opinion that, in the light of all the circumstances shown at the trial, there was sufficient testimony to go to the jury on this point.

A peculiar situation appears from the record. Plaintiff relied upon the fact that the deceased was a child of such tender years that he was attracted to the car by its "queer" appearance, and was therefore not technically a trespasser, and that he was

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unable to appreciate and understand the danger attendant upon the conditions surrounding him; yet the fact that he was so immature as to bring him within the rule of the Stout Case was neither alleged nor proved, and the court gave the jury an instruction on contributory negligence. The plaintiff testified that Amos, who was 11 years of age, was an active, robust boy, able to earn money. In the case of *Buch v. Amory Mfg. Co.*, 69 N. H. 257, 44 Atl. 809, 76 Am. St. Rep. 163, the court said: "The plaintiff was an infant of eight years. The particular circumstances of the accident—how or in what manner it happened that the plaintiff caught his hand in the gearing—are not disclosed by the case. It does not appear that any evidence was offered tending to show that he was incapable of knowing the danger from putting his hand in contact with the gearing, or of exercising a measure of care sufficient to avoid the danger. Such an incapacity cannot be presumed. * * * An infant is bound to use the reason he possesses, and to exercise the degree of care and caution of which he is capable. If the plaintiff could by the due exercise of his intellectual and physical powers have avoided the injury, he is no more entitled to recover than an adult would be under the same circumstances." In view of the fact that the deceased was *prima facie* a trespasser, the burden rested upon the plaintiff to allege and prove facts that would remove that objection to a recovery, and bring the case within the principles laid down in the Stout Case. I do not mean to say—because the question is not before us—that a child so young that his trespass in pursuit of an especially attractive object might be excused could not be guilty of contributory negligence. What I do say is that, where the trespass is excusable on account of the tender years of the child, that fact should be alleged and some proof offered in support of it, unless the child is so very young that there can be no question of his lack of capacity. The case also falls short of the Stout Case in this: There is no allegation in the complaint and no proof that the defendants knew the attractive character of the car. Neither is there any allegation that the defendants should have had such knowledge or have apprehended and foreseen that the car would be especially and unusually attractive to children. I am of opinion that the jury might properly have found the latter fact from the circumstances proven, if the complaint contained the proper allegation.

For the reasons stated, the cause should be reversed, but, as there must be a new trial, it becomes necessary to decide whether the plaintiff may recover in any event. Mr. Chief Justice Brantley does not believe in the doctrine of the "turntable cases," while Mr. Justice Holloway and the writer assent to it. It appears that in many of the decided cases the courts have been led by their sympathies to unreasonably extend the application

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of the doctrine to the point of overturning principles firmly established in the law, and imposing burdens upon the property owner incompatible with the fundamental idea of ownership. It is my judgment that when the owner or occupier of grounds brings or artificially creates something thereon especially attractive to children, as shown by the nature of the thing itself and the fact that a child was, or children were, attracted to it, and leaves it so exposed that they are likely to come in contact with it, either as a plaything or an object of curiosity, and where their coming in contact with it or playing about it is obviously dangerous to them, the person so exposing the dangerous thing should reasonably anticipate the injury that is likely to happen to them from its being so exposed, and is bound to use ordinary care to guard it so as to prevent injury to them.

I am of opinion that the judgment and order appealed from should be reversed and the cause remanded for a new trial.

CALWELL v. MINNEAPOLIS & ST. L. R. Co.

(Supreme Court of Iowa, March 19, 1908.)

[115 N. W. Rep. 605.]

Railroads—Injuries to Person on Track—Implied License—Duty of Company.*—Where there was a well-defined footpath across the track of defendant railroad company in its yard, used for years by hundreds of people going between the town and the shops of another railroad company, to the knowledge of the officers and employees of defendant, there was an implied license to so use its tracks, so that in the operation of its trains it owed to the users of such path the same care it owed the public at a highway or street crossing.

Same—Contributory Negligence—Question for Jury.—The question of contributory negligence, in an action for injury by a train to

*For the authorities in this series on the question, what does, and does not, constitute a license to travel on a railroad track or right of way, see second foot-notes appended to *Wilmurth v. Illinois Cent. R. Co.* (Ky.), 8 R. R. R. 762, 31 Am. & Eng. R. Cas., N. S., 762, where all those preceding it are collected; foot-notes appended to *Copp v. Maine Cent. R. Co.* (Me.), 19 R. R. R. 199, 42 Am. & Eng. R. Cas., N. S., 199; *Louisville & N. R. Co. v. Redmon's Adm'x* (Ky.), 18 R. R. R. 737, 41 Am. & Eng. R. Cas., N. S., 737; *Houston & T. C. R. Co. v. Turner* (Tex.), 18 R. R. R. 630, 41 Am. & Eng. R. Cas., N. S., 630; *Williamson v. Southern Ry. Co.* (Va.), 18 R. R. R. 492, 41 Am. & Eng. R. Cas., N. S., 492; *Keller v. Erie R. Co.* (N. Y.), 22 R. R. R. 599, 45 Am. & Eng. R. Cas., N. S., 599; *Railroad Co. v. Village of Roseville* (Ohio), 25 R. R. R. 173, 48 Am. & Eng. R. Cas., N. S., 173; *Teakle v. San Pedro, etc., R. Co.* (Utah), 25 R. R. R. 18, 48 Am. & Eng. R. Cas., N. S., 18.

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one, who, having an implied license to use a path crossing defendant's track diagonally in its yard, testified that he looked and listened just before going on the track, without observing the train, is for the jury, in view of the question of credibility of the witnesses, the fact that the headlight was dim, not much, if any, brighter than the switch lights in the yard, and that the train, which was running rapidly, gave no signal.

Trial—Directing Verdict.—Unless there is such a lack of testimony as to require the setting aside of a verdict, the court should not direct one.

Appeal from District Court, Polk County; William H. McHenry, Judge.

This is an action to recover damages for a personal injury. There was a directed verdict for the defendant, and the plaintiff appeals. Reversed.

Halloran & Starkey, A. H. McVey, and E. H. McVey, for appellant.

John I. Dillie, for appellee.

SHERWIN, J. The plaintiff received the injury for which he seeks recovery within the corporation limits of the town of Valley Junction. The road of the defendant company runs due east and west through said town, and is paralleled for some distance by the Chicago, Rock Island & Pacific road, the tracks at the point of the injury and for some distance both east and west thereof being about eight feet apart. The Rock Island road maintains shops at a point some distance southwest of the joint depot, and southwest of the point where the plaintiff's injury was received. The plaintiff was an employee of the Rock Island company, whose duty took him to their shops, and while passing from said shops to his boarding house he crossed the defendant's track, and while doing so was struck by the engine of an eastbound passenger train. The collision occurred several hundred feet west of the depot.

Two questions are presented for our determination: First, the question of the negligence of the defendant; and, second, the question of contributory negligence on the part of the plaintiff. The petition alleges that the plaintiff was struck by the train when the same was running from 20 to 30 miles per hour; "that the engineer or fireman neglected or failed to ring the bell or blow the whistle or give any warning or sign to indicate the approach of said train; that employees of both companies used the footpath heretofore mentioned in crossing said tracks, which use was well known to defendant as herein alleged; that the defendant was grossly negligent and careless in running its train at a speed of from 25 to 30 miles per hour through said yards that

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was being so constantly used, without blowing a whistle or ringing a bell, or giving some warning of the approach of said train."

The defendant urges that the plaintiff was at the time of the injury a trespasser upon its track, and that it was not bound to look for him, or give the statutory signal at that particular place. The testimony shows without substantial conflict that a very large number of the employees of the Rock Island road traveled between the town and its shops southwest of the point of the accident, using for such travel a well-worn path which crossed the defendant's track at the point of the injury. The testimony further shows that this use of the path had been continuous for several years, and that such use was well known to the employees of the defendant operating trains upon said road through Valley Junction. This use of the path and the crossing over the defendant's track at the point in controversy is not seriously controverted by the defendant, but it claims that such use does not bring the case within the rule of our cases, which have held that a similar use implies a license or invitation to so use the track. There is no evidence tending to show any objection to such use on the part of the defendant company. In *Clampit v. C., St. P. & K. C. Ry. Co.*, 84 Iowa, 71, 50 N. W. 673, the facts were that, where the accident occurred, the track was daily used by a number of persons, whose employment required them to cross the defendant's track in going to and returning from their work. This was shown to have been known by the company, and we held that the company having, through their employees and officers, knowledge of the use of the footpath crossing, and having made no objection thereto, were presumed to assent to it, and, by so doing, to give to those who used the crossing a license therefor; and it was held that the plaintiff was not a trespasser upon the railroad track, but, on the contrary, was entitled to all the rights and protections of one rightfully thereon, and that he could recover for injuries resulting from the defendant's want of care. It is true that in that case the evidence showed that a stairway had been erected on one side of the track for the passage of those who used the footpath, and, because of this circumstance, the defendant herein attempts to distinguish this case from the *Clampit Case*; but, as we shall hereafter endeavor to show, the distinction cannot avail it. In *Thomas v. C., M. & St. P. Ry. Co.*, 103 Iowa, 649, 72 N. W. 783, 39 L. R. A. 399, a small child was killed while playing upon the defendant's track. The evidence in that case showed that the track had been used at a pathway for some time prior to the accident, and that the employees and the officers of the company had knowledge of that fact, and it was held that a license to so use it would be implied. In that case it appeared that a ladder had been placed on the bridge over the highway for the evident purpose of ascending from the high-

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way to the track and of descending from the track to the highway. Defendant's counsel also attempt to distinguish the Thomas Case and the instant one because of the ladder of which we have spoken. But the ladder in the Thomas Case and the stairway and ties in the Clampit Case were material circumstances only on the question of the defendant's knowledge of the use which was being made of their tracks. This is evident from the language used in the Clampit Case, which was followed and approved in the Thomas Case. The language was as follows: "The stairway and the ties across the ditch, as well as the path made by footmen, prominently advertised the place as a crossing used by pedestrians. No engineer or fireman passing along the tracks at that place with his eyes open, in the exercise of reasonable watchfulness and care, could have failed to see those indications of a footpath, and to understand therefrom that it was used by pedestrians, if he possessed ordinary intelligence." The language just quoted is applicable to the case at bar. Here the testimony shows that there was a well-defined footpath across the defendant's track. It was in the defendant's yard at Valley Junction, and was used by hundreds of people, whose duty or pleasure took them from the town to the shops of the Rock Island road, and there can be no question but what the defendant's officers and employees had full knowledge of the use being made of its track, and under such circumstances, and under the rule of the cases which we have cited, there can be no question that there was an implied license to so use its track. If this be true, it follows that the company, in the operation of its trains, owed to the users of this way the same care that it would owe the public at any highway or street crossing. See cases, *supra*, and *Booth v. Union Ter. Co.*, 126 Iowa, 8, 101 N. W. 147. The appellee contends, however, that this case falls within the rule announced in *Heiss v. Railway Co.*, 103 Iowa, 590, 72 N. W. 787, but the two cases are easily distinguished. In that case the plaintiff was going to the defendant's depot, and, instead of following the sidewalk which led to the platform, he took a path which made a little shorter cut, but which required him to climb onto the station platform from the ground, a distance of about three feet. We held that the railroad company had made every necessary provision for reaching its depot, and that the facts did not show an implied license for the plaintiff to use the path that he took. We are of the opinion that this case is governed by the rule of the cases cited, and that the question of the defendant's negligence, at the time of the accident, should have been submitted to the jury. There was a conflict in the evidence as to whether the bell was rung before reaching this point and while coming into the yard from the west, and there was also evidence tending to show that the train was running at a high rate of speed, and it

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was evidently for the jury to determine from all the facts and circumstances shown whether or not the defendant was guilty of negligence in operating its train at the time in question.

The appellee also insists that the plaintiff was guilty of contributory negligence, and that the verdict was properly directed on that ground alone; but with this contention we find ourselves unable to agree. The footpath to which we have heretofore referred led from the Rock Island shops in a northeasterly direction to the main tracks of the Rock Island road and the tracks of the defendant road, reaching them at a point some distance west of the place of the accident. The Rock Island main line and the switch track were then crossed, and the path went east between the two main lines until it reached the point where the plaintiff was injured. Here it crossed the defendant's main line diagonally, it appearing from the evidence that some three or four steps were necessary to effect the crossing. The plaintiff testified that when he reached the point where the path went east between the tracks he stopped and looked both ways for trains on the defendant's road; that he then went on east and when he reached the point where the path crossed the defendant's track he again stopped and looked and listened for a train; that he neither saw nor heard anything indicating the approach of a train from either direction; and that he immediately started across the track, and was struck just as he reached the north rail thereof. The evidence tended to show that the headlight on the engine of the train was burning very dimly when the engine struck the defendant, and that it was not much, if any, brighter than the switch lights which were burning in the yard west of the point of accident at that time. The evidence also tended to show that the whistle was not sounded or the bell rung until just a moment before the plaintiff was struck. It is true there was a conflict in the evidence on these matters, but it was for the jury to say which line of testimony was entitled to the most credit. It was also for the jury to determine the credibility of the various witnesses who testified, and the weight which should be given to their testimony. While it seems almost impossible that the plaintiff could have looked and listened for this train, as he testified that he did, without seeing or hearing its approach, it was after all, a question which the jury should determine instead of the court. If it believed that he, in fact, looked and listened for this train before attempting to cross the defendant's track, but was unable to either see or hear it because of its failure to blow the whistle or ring the bell, or because of the condition of its headlight and because of the yard conditions, it was justified in finding that he was not guilty of contributory negligence; and we are of the opinion that the facts and circumstances shown are such that we should not say, as a matter of law, that the

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plaintiff was guilty of such negligence. The rule is, of course, well settled that, where reasonable men may reach different conclusions from the same state of facts, the court should not interfere with a verdict, and, unless there is such a lack of testimony as to require the setting aside of a verdict, the court should not direct one.

The case is an extremely close one on the question of the plaintiff's contributory negligence, but we think there was sufficient evidence to take it to the jury. It follows that the trial court erroneously directed a verdict for the defendant, and the case must be reversed.

Reversed.

BIRMINGHAM RY., LLIGHT & POWER CO. v. LANDRUM.

(Supreme Court of Alabama, Dec. 19, 1907.)

[45 So. Rep. 198.]

Negligence—Contributory Negligence—Infants—Presumption of Capability.*—A child between 7 and 14 years of age is prima facie incapable of exercising judgment and discretion, and hence incapable of being guilty of contributory negligence; but such capacity may be shown.

Appeal—Assignments of Error—Waiver—Failure to Argue.—Assignments of error not argued in appellant's brief will be treated as waived.

Trial—Objections to Evidence—Grounds—Necessity for Stating.—Objection to a question asked a witness is properly overruled, where no ground of objection is stated.

Trial—Instructions.—In an action against a street railway company an instruction that if, when plaintiff was injured, he had sufficient age, judgment, and discretion to know the danger of going on the track without stopping and looking for approaching cars, he could not recover, was properly refused, as ignoring the question whether his act proximately contributed to his injury.

Street Railroads—Contributory Negligence—Infants—Failure to Stop, Look, and Listen.*—The liability of an 11 year old child for con-

*For the authorities in this series on the question whether young children can be chargeable with contributory negligence, see first foot-note appended to *Carney v. Concord St. Ry.* (N. H.), 11 R. R. R. 307, 34 Am. & Eng. R. Cas., N. S., 307, where all those preceding it are collected or referred to; foot-notes appended to *Holian v. Boston Elev. Ry. Co.* (Mass.), 25 R. R. R. 742, 48 Am. & Eng. R. Cas., N. S., 742; foot-notes appended to *Pittsburgh, etc., Ry. Co. v. Simons (Ind.)*, 25 R. R. R. 283, 48 Am. & Eng. R. Cas., N. S., 283; foot-notes appended to *Coy v. Missouri Pac. Ry. Co.* (Kan.), 24 R. R. R. 555, 47

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tributory negligence cannot be based upon the sole fact that he had sufficient age and discretion to know the danger of going upon a street railway track without stopping, looking, or listening for approaching cars, since it is not the ability to appreciate danger which might make a child between 7 and 14 years of age responsible for contributory negligence, but it must be a maturity and discretion beyond its years which would lead it to take care.

Trial—Unintelligible Instructions—Propriety of Refusal.—In a personal injury action against a street railway, an instruction that under certain circumstances the "just" must find that the plaintiff was not entitled, etc., was properly refused as unintelligible.

Same—Misleading Instructions.—In a personal injury action, an instruction implying that plaintiff did not listen for approaching cars before going upon defendant's track was properly refused, where plaintiff's testimony tended to show he did listen.

Carriers—Station Tracks—Duty.†—A carrier owes a duty to passengers alighting at a regular station that while making their egress they be not struck by other cars, and, though a passenger must exercise care for his safety, he may assume that the tracks between the alighting place and the station will be kept safe while he is crossing; and hence the mere fact that he fails to look and listen for approaching cars before attempting to cross will not as a matter of law constitute contributory negligence, preventing a recovery if he is struck by such a car.

Same—Evidence.—In an action against a street railway company for injury to an alighting passenger, injured while crossing a track, that the car which struck him was running from six to ten miles an hour and ran two or three car lengths after striking him may be considered on the question of the company's negligence.

Same—Contributory Negligence—Question for Jury.—In an action against a street railway company for injury to an alighting passenger injured while crossing a track, whether he was guilty of contributory negligence held, under the evidence, a question for the jury.

Am. & Eng. R. Cas., N. S., 555; foot-notes appended to *Denver, etc., Co. v. Nicholas* (Colo.), 22 R. R. R. 523, 45 Am. & Eng. R. Cas., N. S., 523.

For the authorities in this series on the subject of the degree of care required of children for their own protection, see foot-notes appended to *Mitchell v. Illinois Cent. R. Co.* (La.), 9 R. R. R. 240, 32 Am. & Eng. R. Cas., N. S., 240, where all those preceding it are collected; foot-notes appended to *Serano v. New York, etc., R. Co.* (N. Y.), 25 R. R. R. 293, 48 Am. & Eng. R. Cas., N. S., 293; *St. Louis, etc., Ry. Co. v. Sparks* (Ark.), 25 R. R. R. 739, 48 & Eng. R. Cas., N. S., 739; foot-notes appended to *Duggan v. Boston & M. R. R.* (N. H.), 24 R. R. R. 797, 47 Am. & Eng. R. Cas., N. S., 797; foot-notes appended to *Illinois Cent. R. Co. v. Johnson* (Ill.), 24 R. R. R. 213, 47 Am. & Eng. R. Cas., N. S., 213; *Van Salvellergh v. Green Bay Traction Co.* (Wis.), 23 R. R. R. 330, 46 Am. & Eng. R. Cas., N. S., 330.

†See foot-notes appended to *Atchison, etc., Ry. Co. v. McElroy* (Kan.), 25 R. R. R. 487, 48 Am. & Eng. R. Cas., N. S., 487.

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Trial—Misleading Instructions.—In an action against a street railway company for injury to an alighting passenger, struck by a passing car while attempting to cross a track, an instruction that the motorman on such car was not bound to give signals, except when passing or about to pass another car, was properly refused, as tending to mislead the jury, where the evidence showed that plaintiff was injured at a station where the car from which he alighted stopped, or so near the station as not to have relieved the motorman of the duty of giving signals of the approach of the car that injured plaintiff.

Street Railroads—Passing Cars—Company's Duty.‡—A street railway company may not excuse its motorman's negligence in failing to give signals or to reduce the speed of his car, resulting in an injury to one attempting to cross the track behind another car, on the ground that it was not the custom to give such signals or to reduce the speed when approaching and passing cars.

Carriers—Passengers—Action for Personal Injury—Instructions.—In an action for injury to one alighting from a street car and struck by a passing car while attempting to cross tracks behind the car from which he alighted, an instruction that, if he alighted before the car reached his station and while it was in motion, he could not recover, was properly refused, since under it he could not recover, though he alighted just before the car stopped and while it was moving very slowly.

Trial—Misleading Instructions.—In an action for injury to one alighting from on street car and struck by another while attempting to cross tracks behind the car from which he alighted, an instruction that if plaintiff alighted before his car reached the regular stopping place, and if a custom to give warning signals when passing a standing car and to reduce speed or stop opposite the standing car existed when the plaintiff was hurt and was for the benefit altogether of passengers alighting from the standing car, and if plaintiff alighted at such point to escape paying fare, then he was not entitled to complain of any violation of such custom, was properly refused, as being involved and misleading.

Same—Instructions.—In a personal injury action against a street railway company, an instruction that the jury was not authorized to find from the evidence that defendant was wantonly or intentionally negligent was properly refused, where plaintiff alleged that its servants were guilty of such negligence, and not that the defendant was.

Words and Phrases—"Wantonness."§—"Wantonness" consists in consciousness by one charged with it, from his knowledge of exist-

‡See extensive note, 18 R. R. R. 296, 41 Am. & Eng. R. Cas., N. S., 296.

§See extensive note, 17 R. R. R. 236, 40 Am. & Eng. R. Cas., N. S., 236.

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ing circumstances and conditions, that his conduct will probably result in injury, and yet, with reckless indifference or disregard of the natural or probable consequences, but without intention to inflict injury, he does or fails to do the act.

Carriers—Wanton Negligence—Speed of Cars.—It was wantonly negligent for a motorman to run his car at a high rate of speed on entering a station and passing another car on an adjoining track, which had stopped or was stopping to discharge passengers.

Same—Instructions.—In an action against a street railway company for injury to an alighting passenger, struck by a passing car while crossing tracks behind and east of the car from which he alighted, an instruction that, if he was injured while crossing the track at a point east of the regular stopping place, the company owed him no duty to cause the car which struck him to be stopped opposite the car from which he alighted while it was standing at the stopping place, was properly refused, as not showing how far east of the stopping place the plaintiff was when injured.

Same.—In an action against a street railway company for injury to a passenger, struck by a passing freight car while passing behind the car from which he alighted, an instruction that, if the passenger car was moving when the freight car passed it, it was not the company's duty to have reduced the speed of the freight car or to have stopped it opposite the passenger car, was properly refused, for not distinguishing between a rapid or slow movement of the passenger car, since a passenger may alight from a slowly moving car, and since a passenger car within a very short distance of a station is likely to be discharging passengers, and it would be culpable negligence for another car, operated by the same company upon the same highway, to pass it at a full or very rapid speed.

Appeal from City Court of Birmingham; Charles A. Senn, Judge.

Personal injury action by Porter Landrum against the Birmingham Railway, Light & Power Company. From a judgment for plaintiff, defendant appeals. Affirmed.

There is no assignment of error calling in question the action of the court on the pleading. The first and third counts are in simple negligence. The second count was in wanton or willful injury. The defense was the general issue and contributory negligence by going upon the track without first stopping, looking, and listening for approaching cars. The evidence tended to show that the plaintiff was a minor about 11 years old; that he had ridden on defendant's electric car line from the end of the line to what is known as "Tenth Street" or "Car Barn" station; that he alighted from the car he was on, and crossed behind it, and stepped onto the adjoining track, and was struck by a car on that

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track running in an opposite direction from the car from which he had alighted; that he had not paid his fare on the car, but had money with which to do it. He had been sent to a drug store, which was at the next stopping place, but got off before arriving at his destination and while the car was slowing up for Tenth Street station, some distance from the usual stopping place. The rate of speed at which the car was running when he got off was in dispute, as was the evidence as to whether the car which struck him gave signals of warning as it approached and passed the car on which plaintiff had been riding. The evidence further tended to show that plaintiff jumped off the rear platform of the car and immediately ran or walked across the track behind the car on which he was riding and onto the track where he was struck by a freight car. It also tended to show that the plaintiff lived on electric car lines, and crossed them daily in going to and from school, and always stopped and looked and listened for the car, or stopped and listened for the car when he could not see it before going on the track. Some of plaintiff's witnesses testified that he traveled on the cars at that time, and that they supposed he was able to take care of himself as any little boy his age, and that he had intelligence to know how to travel by himself on the street car. The mother testified that he was just a common, ordinary boy at the time he got hurt, that he was able to take care of himself on the cars, and that she trusted him to go on the cars by himself. The plaintiff himself testified that he always kept away from cars when they were coming, and that whenever he came to a car track he would look up and down a track to see if one was coming, and if he could not see he would stop and listen; that he walked across the track behind the car, walking slowly, and heard no warning, listening all the time; that he did not stop while he was walking, and could not see on the other track; that there was two or three feet between the tracks, and the cars extended over the tracks some; that he could not see until he had gotten around the edge of the passing car, and was then near about the other track when the freight car hit him at once; that when he got to the side of the car on which he was riding next to the other track he did not look down the track towards Birmingham; that he looked at the track, but did not look either up or down, but that he stopped and listened, because he knew it was dangerous to get on the track if another car was coming. The defendant's evidence tended to show that the plaintiff swung off the car he was riding on when it was about 60 feet from the usual stopping place, and ran behind it onto the track on which the freight car was approaching, and was struck by it. The evidence was in conflict as to the speed of this car.

The following charges were refused to the defendant: "(1) If the jury find, from the evidence, that the plaintiff at the time

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of his injury had sufficient age, judgment, and discretion to know and appreciate the danger of going on defendant's track without stopping and looking for the approach of cars thereon, the jury cannot find for the plaintiff under the third count of the complaint. (2) If the jury find, from the evidence, that the plaintiff had sufficient age, discretion, and judgment to know and appreciate the danger of going upon the track of defendant without stopping, looking, and listening for approaching car, and if the jury further find, from the evidence, that defendant's freight trip was running at not exceeding half its usual speed between stations as it passed the passenger car, then the jury must find for the defendant. (3) If the jury believe, from the evidence, that the plaintiff at the time he was struck by the car of defendant had ceased to be a passenger of defendant, then the jury must find that the plaintiff was not entitled to an observance of the custom of the defendant's employees to give warning of the car approaching another standing car on the adjoining track, or to reduce its speed or stop opposite it. (4) The plaintiff, if the jury find that at the time he was hurt he was capable of being guilty of negligence, would not be excused from stopping, looking, and listening before going on defendant's track for cars on it, by reason of the existence of a custom on the part of defendant's employees to give signals of warning when approaching and passing moving cars on the adjoining tracks. (5) If the jury believe, from the evidence, that at the time of the injury to the plaintiff the plaintiff had sufficient age, judgment, and discretion to know and appreciate the danger of going upon defendant's railroad track without stopping and looking and listening for the approach of cars thereon the jury must find for defendant. (6) If the jury believe the evidence, they must find from it that plaintiff was guilty of negligence which proximately contributed to his injuries. (7) The law imposes no duty on the motorman on defendant's freight trip in the matter of giving signal, except when the freight trip was passing or about to pass another car of defendant. (8) If the jury believe the evidence, they must find from it that the plaintiff at the time of his injury had sufficient age, judgment, and discretion to know and appreciate the danger of going upon defendant's track without stopping, looking, or listening for approaching cars. (9) Unless the jury find, from the evidence, that it was the custom and practice on defendant's railroad, at the time plaintiff was hurt, for its motorman to give signals of warning and to reduce speed or stop when approaching or passing cars on the adjoining track, which was standing or moving along it, the jury must find for the defendant. (10) If the jury find, from the evidence, that plaintiff got off the passenger car before it reached the station at Tenth street, or the car barn, and while the car was in motion, the jury must find for the

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defendant. (1) If the jury believe, from the evidence, that the plaintiff got off defendant's car before it reached the regular stopping place, and if the jury find, from the evidence, that the custom or practice to give signals of warning when passing a standing car, and to reduce speed or stop opposite the standing car, existed at the time plaintiff was hurt, and was for the benefit altogether of passengers alighting from the standing car, and if the jury further find, from the evidence, that the plaintiff got off the car at such point to save himself from paying fare, then the plaintiff is not entitled to complain of the violation of such practice or custom, if the jury find, from the evidence, it was violated by defendants' servants." (12) General affirmative charge. (13, 14, and 15) affirmative charges as to the first, second, and third counts. "(16) The jury are not authorized to find, from the evidence, that defendant is guilty of wanton or intentional negligence. (17) If the jury find, from the evidence, that the plaintiff was injured while crossing defendant's track at a point east of the regular station or stopping place, then the defendant would not owe him the duty to cause its freight trip of cars to be brought to a standstill opposite the passenger car while it was standing at the station. (18) If the jury find from the evidence that the passenger car was not standing still, but was moving when the freight trip passed it, then it was not the duty of defendant to have reduced the speed of its freight trip, or to have brought it to a standstill opposite the passenger car. (19) The jury are not authorized to find, from the evidence, that it was the duty of defendant's motorman on the freight trip to give signals when approaching the passenger car, if the passenger car was also moving when the freight trip passed it."

Tillman, Grubb, Bradley & Morrow, for appellant.

Bowman, Harsh & Beadow, for appellee.

HARALSON, J. This was an action by plaintiff, a boy who was about 2 months over 11 years of age. It is well settled, that a minor between 7 and 14 years of age is prima facie incapable of exercising judgment and discretion, but evidence may be received to show capacity. *B. R. L. & P. Co. v. Jones*, 146 Ala. 277, 41 South. 148; *T. C. C. & I. Co. v. Enslin*, 129 Ala. 345, 30 South. 600. In the latter case it was said: "Contributory negligence may, under some conditions, be imputed to an infant under 14 years of age, as a matter of law, as where the evidence of his care and prudence and his capacity to exercise judgment and discretion is not in conflict, and different inferences cannot be drawn therefrom. The fact, however, that the infant was shown to be 'bright, smart and industrious,' without more, is not sufficient to overcome the presumption of want of discretion which his age prima facie implies; for, an infant may be all this

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and yet be so wanting in judgment and discretion as to make him rash and imprudent."

There were no assignments of error on any question of pleading. We take them up as made.

The second, third and fourth assignments are not argued in brief of appellant, and will be treated as waived. *B. R. L. & P. Co. v. Oldham*, 141 Ala. 200, 37 South. 452.

The first assignment has reference to the action of the court in overruling defendant's objection to a question asked witness Matthews. Defendant stated no ground of objection to the question, and the court below could not be compelled to hunt for grounds. *L. & N. R. R. Co. v. Banks*, 132 Ala. 489, 31 South. 573.

Charge 1, asked and refused to defendant, ignores consideration of whether or not plaintiff's action proximately contributed to his injury. *Jones' Case*, 146 Ala. 277, 41 South. 148. Furthermore, the charge is faulty in that it fixes the liability of a child for contributory negligence, though only about 11 years old, solely upon the hypothesis, that he "had sufficient age, judgment and discretion to know and appreciate the danger of going upon defendant's track, without stopping and looking for the approach of cars thereon." It is not the ability to know or even appreciate danger which might make a child, between 7 and 14 years old, responsible for contributory negligence, but it must be a maturity and discretion beyond its years, which would lead it to take care. It should have been as blameworthy as a person over 14 years ordinarily is. This as a matter of law, cannot be affirmed by the defendant.

For the same reason, the second and fifth charges were properly refused. A child of 11 might appreciate the danger that he would be in, if he neither stopped, looked or listened, when he could not appreciate the danger, if he was conscious that he was listening, but did not stop. It may be assumed as a fact, that most persons do not think that ordinary care requires them to stop in crossing a street car track, while they would admit the necessity of looking and listening with reasonable diligence.

Charge 3, refused for defendant, is unintelligible, in the use of the word "just," which warranted the court in refusing it.

The fourth charge predicates that, at the time plaintiff was hurt, he was capable of being guilty of negligence, and assumes that he did not stop, look and listen. Besides the plaintiff testifies, and his evidence is undisputed, that he did listen, which the charge implies he did not do, and in this respect it was misleading. It also misleads in that, plaintiff's negligence, if guilty of any, would not be excused by the negligent failure of defendant's servants to observe their usual precautions. The place where the injury occurred was at a station, where the cars were

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in the habit of stopping for persons to get on and off the train. Under such circumstances, the carrier owes them a duty, that while making their egress they be not struck by other passing trains, and while a passenger is not absolved from the duty of exercising care for his safety, he has a right to presume that the tracks intervening between the place where he is to alight, and the station, will be kept safe while he is crossing; so that the mere fact that he fails to look and listen for an approaching train before attempting to cross, will not, as a matter of law, be ascribed to his contributory negligence, and will not prevent a recovery of damages if he is struck by such a train. 2 Thompson Negligence, § 2705.

The evidence of the defendant tended to show that the freight car that struck plaintiff, was moving at the time 6 or 8 miles an hour as one witness testified, and that it was running 8 or 10 miles an hour as testified by another; another, that it ran 8 or 10 miles, and ran two or three car lengths after it struck plaintiff. In considering plaintiff's negligence, all such facts are to be considered.

Charges 6 and 8 were properly refused. The sixth, because as a matter of law it asserts that the plaintiff was guilty of contributory negligence—a question clearly for the jury under all the evidence.

Charge 7 was properly refused. The principle asserted was calculated to mislead the jury, since the evidence shows that the boy was injured at the station, where the car from which he alighted stopped, or so near to the station, as not to have relieved defendant's servant of the duty of giving signals of the approach of the freight car that injured him.

The ninth charge was improper. It tells the jury, as matter of law, that the defendant was entitled to a verdict, unless the jury found that it was the custom and practice on defendant's road, at the time plaintiff was hurt, for the motorman to give signals of warning and to reduce speed or stop when approaching and passing cars on the adjoining track, which were standing or moving. This would give defendant a license to go on violating the dictates of common prudence, and be absolved from all responsibility for such violation.

The tenth charge scarcely needs argument to condemn it. Under it, as counsel for appellee well says, the jury would have been compelled to find for defendant, although the plaintiff was a passenger, and got off the car six inches before it stopped at the station, and while it was moving very slowly, scarcely perceptibly, although the motorman saw plaintiff's danger in time to avoid it by the exercise of diligence after discovering his peril. There is no such issue in the case as a violation of custom. It is one of negligence *vel non*. The plaintiff is not complaining of

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the violation of the custom, but of negligence of which custom and its violation are merely evidence.

Charge 11 is involved and misleading, and for that reason was properly refused.

The twelfth, thirteenth, fourteenth and fifteenth charges were mere general charges under counts 1, 2 and 3 of the complaint, and, from what has been said, there was no room for such instructions.

The sixteenth charge was also properly refused. The charge is not that defendant, but its servants, were guilty of wanton or intentional negligence. *City Delivery Co. v. Henry*, 139 Ala. 161, 34 South. 389.

Wantonness consists, as we have defined it, in consciousness on the part of the person charged with it, from his knowledge of existing circumstances and conditions, and that his conduct will probably result in injury, and yet, with reckless indifference or disregard of the natural or probable consequences, but without intention to inflict injury, he does or fails to do the act. *L. & N. R. R. Co. v. Anchors*, 114 Ala. 492, 22 South. 279, 62 Am. St. Rep. 116.

The second count, in which issue was taken, charges wantonness.

It was open to the jury to find under the evidence, that defendant's servant was guilty of wantonness. He ran into the station at a rapid rate of speed, with the situation known to the motor-man. To run a car as he did this one, according to the tendencies of the evidence, would support the charge of wantonness. *B. R. L. & P. Co. v. Oldham*, 141 Ala. 200, 37 South. 452.

The seventeenth charge does not predicate how far east of the regular stopping place it was when plaintiff was injured. In this respect it was too indefinite. It might have been an inch or foot or many feet. This did not exempt the defendant from liability under the evidence.

Charge 18 does not distinguish between the passenger car moving rapidly or barely moving. A passenger may alight from a slowly moving street car. A passenger car, within a very short distance of a station is likely to be discharging passengers, and it would be culpable negligence for another car operated by the same company upon the same highway, to run at a full or very rapid speed. The nineteenth charge is subject to the same infirmity.

This disposes of the assignments of error insisted on. No error appearing, the judgment below is affirmed.

Affirmed.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

SAXTON v. PITTSBURG RYS. CO.

(Supreme Court of Pennsylvania, Jan. 6, 1908.)

[68 Atl. Rep. 1022.]

Street Railroads—Injury to Trespasser—Question for Jury.—In an action against a street railway company to recover for injuries to a boy five years old injured while riding on the step of the platform of a car, the question of negligence of defendant on conflicting evidence was for the jury.

Negligence—Imputed Negligence.*—Where the parents of a boy five years old knew that once or twice he had gone to the home of his aunt nearby, but did not know he was in the habit of doing it, the father of the boy was not precluded from recovering for injuries to the boy on the street on the ground that he had permitted his son to go on the street in the business part of the city unattended.

Trial—Remarks of Counsel.†—In an action against a street railway company for injury to a child, remarks of counsel for plaintiff, without any foundation in fact, that evidence had been suppressed, and asking the jury to make this company out of its millions put "on that stump a foot as good as new," and it was idle for the railway company to cry for justice, but to give justice to the boy and make the railroad company pay from \$5,000 to \$20,000, and give them the justice they want, was ground for reversal.

Appeal from Court of Common Pleas, Allegheny County.

Action by B. H. Saxton, suing for himself and as next friend of B. H. Saxton, Jr., against the Pittsburg Railways Company. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before FELL, BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

*For illustration in this series of the question, what is, and is not, contributory negligence on the part of parents, in actions by them for injuries to their children, see foot-notes appended to *St. Louis, etc., Ry. Co. v. Colum* (Ark.), 11 R. R. R. 807, 34 Am. & Eng. R. Cas., N. S., 807, where all the preceding ones are collected, foot-notes appended to *Serano v. New York, etc., R. Co.* (N. Y.), 25 R. R. R. 293, 48 Am. & Eng. R. Cas., N. S., 293.

†For the authorities in this series on the subject of arguments and remarks of counsel reflecting upon the credibility of witnesses, etc., see foot-notes appended to *Illinois Cent. R. Co. v. Proctor* (Ky.), 18 R. R. R. 531, 41 Am. & Eng. R. Cas., N. S., 531, where all the preceding ones are collected; foot-notes appended to *Seaboard Air Line Ry. v. Smith* (Fla.), 25 R. R. R. 793, 48 Am. & Eng. R. Cas., N. S., 793; *Pullman Co. v. Pennock* (Tenn.), 25 R. R. R. 179, 48 Am. & Eng. R. Cas., N. S., 179; *Whipple v. Michigan Cent. R. Co.* (Mich.), 23 R. R. R. 767, 46 Am. & Eng. R. Cas., N. S., 767.

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William A. Challener, Clarence Burleigh, and James C. Gray,
for appellant.

F. C. McGirr and John Marron, for appellee.

FELL, J. The first two assignments of error relate to the right of the plaintiffs to recover. They cannot be sustained. The boy injured was five years and three weeks of age. While the defendant's car was standing at a crossing, he got on a step of the front platform. The platform was entirely closed by wooden doors, with glass windows in the upper panels. He took hold of a horizontal bar fastened to the woodwork of the door a few inches below the glass. He testified that, after the car was in motion, the motorman looked through the glass and saw him, and shook the door and caused him to fall. This testimony was denied by the motorman, who testified that he did not see the boy or shake the door, and there was testimony that tended to show that the motorman could not have seen him because the wooden part of the door was several inches higher than the boy's head, and that the boy while standing on the step was two or three feet back of the position occupied by the motorman. It was not, however, shown that it was impossible that the motorman by change of position or by leaning over could have seen, and the positive testimony of the boy that he did see him took the case to the jury on the ground of negligence in shaking the door when the boy was in a place of danger. *Levin v. Traction Co.*, 194 Pa. 156, 45 Atl. 134. The father of the boy was not precluded from recovering because he permitted his son to go on the street in a business part of the city unattended. The boy had gone almost daily to the home of his aunt nearby and had on a few occasions gone with his cousin, a boy 16 years old, to deliver papers in the street. His parents knew that he had done this once or twice, but did not know that he was in the habit of doing it, and on the occasion of his injury they did not know that he had left his aunt's house or was likely to do so.

The remaining assignments of error may be considered together. They charge misconduct of counsel in addressing the jury. The remarks objected to as being improper are: "Now, this is what I charge frankly and plainly in this case, a suppression of evidence, and by that I ask you 12 men to determine this case, if you have any hesitancy about the conclusion upon the evidence in the case. I ask you in money to make this company, with its earnings, and out of its earnings, out of its millions, for which it is in this business—it is not a charity, it is not a benevolence, it is a business just as hard and cold as any that can be estimated in dollars and cents—I ask you to make this company out of its millions to put on that stump a foot as good as the original. It is idle for them to cry for justice. Give it to him; that is what we want, and that is what we ask. Give

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it to him, whatever we ask, \$5,000, \$10,000, \$15,000 or \$20,000, whatever it is make them pay it, and give them the justice they want." These remarks were objected to at the time, and were taken down by the official stenographer, and by leave of court filed as a part of the record. Motions were made to withdraw a juror and continue the case. The overruling of these motions is assigned for error. There was not the slightest foundation in the testimony nor in the circumstances connected with the case to support the statement of counsel that there had been a suppression of evidence, and the jury were so instructed by the court in answer to points presented by defendant's counsel. This instruction did not cure the error of counsel. The effect of the statement on the minds of the jury is as manifest as was its purpose. The other statements were intemperate appeals to the prejudices of the jury and invitations to find a verdict on false grounds.

No verdict that may have been obtained by such means should be allowed to stand, and the effective remedy is to withdraw a juror and continue the case. If courts are to continue to be places where justice is judicially administered, causes must be fairly presented and fairly defended, and the duty of counsel in this regard is not less important nor less imperative than that of the judge. A cause is not well tried unless fairly tried, and a verdict obtained by incorrect statements or unfair argument or by an appeal to passion or prejudice stands on but little higher grounds than one obtained by false testimony. It is not founded on the truth of the cause. In sustaining an assignment based on improper comments of counsel, it was said in the opinion in *Holden v. Railroad Co.*, 169 Pa. 1, 32 Atl. 103, that the only efficacious remedy in such a case was to withdraw a juror, and that the practice of doing so which obtained in some courts should be widely extended as an admonition to counsel. In the recent case of *Wagner v. Hazle Township*, 215 Pa. 219, 64 Atl. 405, an offer of testimony was made with the intention to bring to the attention of the jury an irrelevant fact. In reversing the judgment it was said by our Brother Mestrezat: "When an attorney in the trial of a cause willfully and intentionally makes an offer of wholly irrelevant and incompetent evidence, or makes improper statements as to the facts in his address to the jury, clearly unsupported by any evidence, which are prejudicial and harmful to the opposite party, it is the plain duty of the trial judge, of his own motion, to act promptly and effectively by reprimanding counsel and withdrawing a juror and continuing the case at the costs of the client. In no other way can justice be administered, and the rights of the injured party be protected. The imposition of the costs will remind the client that he has an attorney unfaithful to him as well as to the court. The obligation of fidelity to the court which an attorney assumed on his admission to the

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bar is ever thereafter with him, and, when he attempts to defeat the justice of a cause by interjecting into the trial wholly foreign and irrelevant matter for the manifest purpose of misleading the jury, he fails to observe the duty required of him as an attorney, and his conduct should receive the condemnation of the court. This condemnation can and should be made effective."

The judgment is reversed, with a venire *facias de novo*.

SOUTHERN RY. CO. v. STEWART.

(Supreme Court of Alabama, Nov. 28, 1907.)

[45 So. Rep. 51.]

Railroads—Injuries to Persons on Tracks—Negligence after Discovery of Peril of Person Injured—Actions—Complaint.—A count of a complaint against a railway company for causing the death of plaintiff's intestate alleged that at a certain time defendant was operating a railroad, and that one of its trains was being run at a certain crossing; that while plaintiff's intestate, then in life, was lying on the track of said railroad near the crossing, the train was approaching him under the management and control of defendant's servants; that he was put in peril, and that defendant's servants saw the peril and that plaintiff's intestate would not likely make any effort to avoid being injured; that after the discovery of his peril defendant's servants in charge of the engine and train so negligently and carelessly conducted themselves in the management, thereof that the engine was caused to run upon said intestate and kill him. Held, that the count was sufficient, as against a demurrer on the grounds that it did not show that defendant's servants saw the peril of intestate in time to prevent injuring him, and that it appeared from the complaint that he was a trespasser, and that it did not appear that defendant or its employees wantonly or willfully killed him, and that it appeared that he was guilty of contributory negligence proximately contributing to his own death in failing to extricate himself from his perilous position before the train reached him, since in such cases, after stating facts showing a duty, very general averments of negligence are sufficient.

Negligence—Contributory Negligence—Defense to Action for Negligence after Discovery of Peril of Person Injured.*—Contributory negligence, to be a defense to an action for negligence on the part

*For the authorities in this series on the subject of the combined effect of contributory negligence and negligence after discovery of plaintiff's peril, see foot-notes appended to *Harrington v. Los Angeles Ry. Co.* (Cal.), 9 R. R. R. 191, 32 Am. & Eng. R. Cas., N. S., 191, where all those preceding it are collected; foot-notes appended to *MacFeat v. Philadelphia, etc., R. Co.* (Del. Sup'r Ct.), 24 R. R. R.

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of defendant after discovering the peril of the person injured, must be the negligent act or omission of the injured person, with a knowledge of the then present and impending peril.

Railroads—Injuries to Persons on Track—Actions—Burden of Proof—Defendant's Failure to Use Servants as Witnesses.†—The burden of proof is on plaintiff to make out a case against a defendant railway company for running over plaintiff's intestate, and until a prima facie case is made no duty to offer evidence rests on defendant; hence failure of defendant to call its engineer or conductor as a witness in its behalf cannot be considered by the jury for the purpose of making out a prima facie case against the defendant.

Same—Duty as to Trespassers.†—The law imposes no duty on a railway company to keep a lookout for trespassers in the operation of its trains; hence there can be no recovery for an injury to a trespasser, except in case of willful or wanton misconduct, or for negligence after discovery of the peril.

Same—Questions for Jury—Engineer's Knowledge of Trespassers.—Persons on Track.—In an action against a railway company for running over plaintiff's intestate, where there was no evidence of the speed of the train, nor of the position of the engineer, nor that the train could have been stopped quicker, nor that the engineer was looking forward at a place where deceased could have been discovered in time to have avoided the accident, the facts that the track at the place of the injury was straight for a mile and half on either side, and that the day was bright and clear, are not sufficient to authorize a reasonable inference that the engineer in fact discovered decedent in time to have avoided the injury, nor to warrant submitting such issue to the jury.

56, 47 Am. & Eng. R. Cas., N. S., 56; foot-notes appended to Birmingham, etc., Co. v. Jones (Ala.), 20 R. R. R. 568, 43 Am. & Eng. R. Cas., N. S., 568; foot-notes appended to Louisville Ry. Co. v. Hoskins' Adm'r (Ky.), 17 R. R. R. 484, 40 Am. & Eng. R. Cas., N. S., 484; foot-notes appended to Dean v. Oregon R. & Nav. Co. (Wash.), 16 R. R. R. 237, 39 Am. & Eng. R. Cas., N. S., 237.

†For the authorities in this series on the question whether a presumption of negligence arises from the fact that a person is struck by a train, see foot-notes appended to Kearns v. Southern Ry. Co. (N. Car.), 21 R. R. R. 848, 44 Am. & Eng. R. Cas., N. S., 848; St. Louis, etc., Ry. Co. v. Evans (Ark.), 23 R. R. R. 314, 46 Am. & Eng. R. Cas., N. S., 314; foot-notes appended to Hot Springs St. Ry. Co. v. Hildreth (Ark.), 18 R. R. R. 168, 41 Am. & Eng. R. Cas., N. S., 168, where all those preceding it are collected; foot-notes appended to Gainesville, etc., Ry. Co. v. Austin (Ga.), 25 R. R. R. 704, 48 Am. & Eng. R. Cas., N. S., 704; St. Louis, etc., Ry. Co. v. Chapman (C. C. A.), 22 R. R. R. 622, 45 Am. & Eng. R. Cas., N. S., 622.

As to the presumption arising from failure to call or produce railroad employees as witnesses, see note appended to Weinkle v. Brunswick & W. R. Co. (Ga.), 14 Am. & Eng. R. Cas., N. S., 50.

‡See extensive note, 21 R. R. R. 218, 44 Am. & Eng. R. Cas., N. S., 218; St. Louis, etc., Ry. Co. v. Sparks (Ark.), 25 R. R. R. 739, 48 Am. & Eng. R. Cas., N. S., 739.

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Appeal from Circuit Court, Jackson County; W. W. Haralson, Judge.

Action by Adelaide E. Stewart, administratrix, against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

The second count is as follows: "Plaintiff, as said administratrix, claims of the defendant, the Southern Railway Company, a corporation, the sum of \$1,999, as damages, for this: The defendant, on or about the 30th day of April, 1905, was engaged in operating a railroad in this county and running trains thereon for the transportation of passengers and freight; that on said date one of defendant's trains, consisting of an engine and cars thereto attached, was being run on the said railroad by its servants and agents in this county at a road crossing near Flackler. And plaintiff avers that her intestate, then in life, was lying on the track of said railroad at or near said crossing; that while lying there said engine and cars were approaching said intestate under the management and control of defendant's agents and servants; that plaintiff's intestate was put in peril of his life or of great bodily harm by said approaching train; that the agents and servants of the defendant in charge of said engine and cars saw said peril of plaintiff's intestate, and saw that plaintiff's intestate would not likely make any effort to avoid being injured; that after the discovery of intestate's peril the agents and servants of defendant in charge of said engine and cars so negligently and carelessly conducted themselves in and about the management of said engine and train that said engine was caused, by reason of such negligence, to run upon intestate and kill him." The following grounds of demurrers were interposed to this count: "(1) It is not shown thereby that defendant's servants or employees saw the peril of intestate in time to have prevented injuring him, or in time to have stopped said train before reaching him. (2) It appears therefrom that plaintiff's intestate was a trespasser on said track. (3) It does not appear therefrom that defendant or its employees wantonly or willfully killed plaintiff's intestate. (4) It appears therefrom that plaintiff's intestate was guilty of contributory negligence proximately contributing to his own death in failing to extricate himself from his perilous position before said train reached him."

Briefly stated, the case made by the plaintiff's evidence is as follows: Deceased was drunk, and down on the track between the rails; his head resting on one of the rails, and his body extending across the track to the other rail. The roadbed was filled up to surface of the cross-ties. The rails were five or six inches high, and their surface bright from wear. The track was perfectly straight in the direction from which the train came to the point where deceased was killed, a distance of $1\frac{1}{2}$ or 2 miles,

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and also perfectly straight from that point towards Flackler, a distance of $1\frac{1}{2}$ miles. There were no weeds on the track. There was a crossing between the place where deceased was killed and the approaching train, for which the engineer blew the signal. It was several hundred yards from this crossing to the place of the killing. There was another crossing not far from beyond the point at which deceased was killed. The train ran several hundred yards beyond the point where deceased was struck before being stopped. The day was bright and clear, and the time of the killing about 10 o'clock in the morning.

Humes & Spcake, for appellant.

Bilbro & Moody, for appellee.

DOWELL, J. The second count of the complaint was not subject to the demurrer interposed by the defendant. In cases of this character it has been frequently decided by this court that, after stating facts showing a duty, very general averments of negligence are held sufficient on demurrer to the complaint. *L. & N. R. R. Co. v. Marbury Lumber Co.*, 125 Ala. 237, 28 South. 438, 50 L. R. A. 620; *Central of Ga. Ry. Co. v. Foshee*, 125 Ala. 199, 27 South. 1006. The negligence relied on in the second and third counts of the complaint was negligence of the defendant's servant or servants after discovery of the peril of the plaintiff's intestate. While contributory negligence on the part of the person injured is pleadable as a defense to such complaint, yet, in order to make a good plea, it must be shown that the contributory negligence relied on was the negligent act or omission of the injured party with a knowledge of the then present and impending peril. *Johnson v. Birmingham R., L. & P. Co. (Ala.)* 43 South. 33; *Duncan v. St. L., etc., Ry. Co. (Ala.)* 44 South. 418; *L. & N. R. R. Co. v. Brown*, 121 Ala. 221, 25 South. 609. In this respect neither of the pleas to the second and third counts of the complaint was sufficient. These pleas did nothing more than to set up a condition that existed prior to the discovery by defendant's servants of the deceased's peril. The fact that the deceased was a trespasser and remained on the track until he was run over and killed, without more, is no answer to a charge of negligence on the part of the defendant after discovery of the peril of the deceased.

The case was tried alone on the testimony of plaintiff's witnesses. The defendant introduced no evidence. The burden was upon the plaintiff to make out her case, and until she made a prima facie case no duty to offer evidence rested on the defendant. The failure or refusal of the defendant to put its engineer or conductor on the stand as a witness in its behalf could not be considered by the jury for the purpose of making out a prima facie case against the defendant. It is conceded that the de-

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ceased was a trespasser. It is well settled in this state that the law imposes no duty upon railroad companies in the operation of their trains to keep a lookout for trespassers; and hence for an injury to such trespassers no recovery could be had for any thing less than willful or wanton misconduct, unless it be for negligence after discovery of peril.

There was no evidence of the speed of the train, none as to the position of the engineer on the train, none that the train could have been stopped any quicker than it was stopped, and none that the deceased could have been seen by the engineer in time to have stopped. The facts that the track at the place of the injury was straight for a mile and a half and that the day was bright and clear alone are not sufficient to authorize a reasonable inference that the engineer in fact discovered the deceased in time to have avoided the injury. The evidence shows that the deceased was lying down on the track between the rails, and there is no evidence that the engineer was looking forward at a time and place when the deceased could have been discovered in time to have stopped the train and avoided the accident, and it is a matter of common knowledge that engineers, in the operation of engines, have other duties to perform besides that of lookout, and, for aught that can be said, the engineer was at the time engaged in performance of some other of such duties. It would be an unwarranted speculation to leave it to the jury to say whether or not the engineer was at the time, looking forward and did discover, or could not have discovered, the deceased on the track in time to have avoided the injury by the exercise of due care.

On the plaintiff's evidence, this being all that was introduced in the case, and in our judgment insufficient to make a *prima facie* case, the court should have given the general affirmative charge requested by the defendant. See *Sou. Ry. Co. v. Samuel Gullatt* (Ala.) 43 South. 577, and other cases cited in brief of appellant's counsel.

For the error pointed out, the judgment is reversed, and the cause remanded.

Reversed and remanded.

TYSON, C. J., and SIMPSON and DENSON, JJ., concur.

GERMAN-AMERICAN INS. CO. *v.* SOUTHERN RY. CO.

(Supreme Court of South Carolina, Aug. 3, 1907.)

[58 S. E. Rep. 337.]

Railroads—Fires Set by Locomotives—Liability.*—Where cotton is deposited on the premises of a railway company under an agreement that it remain on the premises of the company without its consent at the sole risk of the shipper until tendered and accepted for shipment, the carrier is not liable for its loss by fire from its locomotive under Civ. Code 1902, § 2135, making every railroad company responsible for property destroyed by fire from its engines, unless the property was placed on the right of way unlawfully and without its consent.

Gary, J., dissenting.

Appeal from Common Pleas Circuit Court, Fairfield County; Prince, Judge.

Action by the German-American Insurance Company, the Royal Insurance Company, and Millett & Co. against the Southern Railway Company. Judgment for plaintiffs. Defendant appeals. Reversed.

Defendants appeals on following exceptions:

(1) "That his honor, the presiding judge, erred in refusing the motion to direct a verdict in favor of the defendant, upon the ground that it appeared from the undisputed evidence in the case that the property destroyed had been placed on the defendant's right of way by Millett & Co., the owners, with knowledge that the defendant did not consent to its being so placed before it should be tendered for shipment, and that it was never so tendered.

(2) "That his honor, the presiding judge, erred in refusing to direct a verdict for the defendant, for the reason that there was no testimony tending to show that the property which was destroyed while upon the defendant's right of way had been placed on such right of way with its consent.

(3) "That his honor, the presiding judge, erred in refusing to

*For the authorities in this series on the question whether a railroad company may stipulate against liability for its negligence in setting fires through the operation of locomotives, see extensive note, 8 R. R. R. 42, 31 Am. & Eng. R. Cas., N. S., 42; foot-notes appended to Mansfield Mut. Ins. Co. *v.* Cleveland, etc., R. Co. (Ohio), 23 R. R. R. 732, 46 Am. & Eng. R. Cas., N. S., 732; foot-notes appended to James Quirk Milling Co. *v.* Minneapolis, etc., Ry. Co. (Minn.), 20 R. R. R. 584, 43 Am. & Eng. R. Cas., N. S., 584.

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direct a verdict for the defendant, for the reason that it appeared from the evidence that there was a misjoinder of parties plaintiff and of causes of action. The rights of the plaintiffs being several, and not joint, the evidence could not sustain a verdict in favor of the defendants jointly.

(4) "That his honor, the presiding judge, erred in refusing the defendant's motion for a new trial, for the reason that there was no testimony tending to show that the cotton destroyed had been placed upon the defendant's right of way with its consent.

(5) "That his honor, the presiding judge, erred in refusing the defendant's motion for a new trial, on the ground that the verdict, being for a single sum in favor of the defendants jointly, was not supported by the evidence, which showed the rights of the plaintiffs to be several, and not joint.

(6) "That his honor, the presiding judge, erred in charging the jury, with reference to the cotton on the right of way: "Now, if you find it was there with the knowledge of the defendant company, then the inference, in the absence of other testimony, the inference might be drawn that it was there with the consent of the company; and that inference arises only in those cases where the property of one is placed upon the lands of another, who has a right to object to its being there. But I charge you that a railway company has a right to object to the storing of cotton on its right of way that is not placed there for the purpose of shipment on the railroad—in that he thereby instructed the jury, in effect, that an inference of consent on the part of the company to the placing of property on its right of way arose from the fact, if shown by the evidence, that the property was placed upon such right of way with its knowledge, in the absence of any other testimony, and was a charge on the facts, in violation of section 26, art. 5, of the Constitution of this state, and said charge was in violation of the provisions of section 2135, 1 Code of Laws of South Carolina 1902, which required the plaintiff to affirmatively prove consent on the part of the railway company to the placing of the property on its right of way.

(7) "That his honor, the presiding judge, having charged the jury that 'the statute exempts the railroad company from liability for the destruction by fire of property placed upon its right of way without its consent, and recognizes the right of the company to withhold its consent when any property is placed thereon, and such consent must be affirmatively shown,' erred in also charging the jury that the inference that the company consented to the property being placed on its right of way arose, if the jury should find that it was placed there with the knowledge of the company, it having a right to object, in the absence of any other testimony, the charge being contradictory, and making proof of knowledge equivalent under the statute to proof of consent.

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(8) "That his honor, the presiding judge, erred in construing the written notice, Exhibit F, introduced in evidence, and in charging the jury in reference thereto, as follows: 'By this notice the railway says it doesn't consent. It is for you to say whether it did or not. It says the cotton is there at the risk of the owner. I charge you that, if the railroad consented for that cotton to be there, the railroad couldn't limit its liabilities under that statute. The question is: Did the railroad company consent for it to be there? If it consent for it to be there, it can't say: "I consented for it to be there, but it must be at your risk." I charge you that under that statute the railroad company can't do that; and, if the railroad company consented for it to be there, why, then, it was at the risk of the railroad if it burned it. Now, that is my interpretation of the law in connection with this notice that has been placed in evidence,—whereas, it is submitted that the railroad company was under no obligation to permit property to be placed or to remain on its right of way until it should be tendered for shipment, and could, in the exercise of its rights, attach to its permission that property be placed or remain on its right of way before being tendered for shipment, a valid condition that should be there without its consent, and at the risk of its owner until tendered for shipment."

B. L. Abney and W. H. Townsend, for appellant.

J. E. McDonald, for respondents.

JONES, J. The plaintiff insurance company seeks to be subrogated to the rights of Millett & Co. to recover under section 2135 of the Civil Code of 1902. This statute makes every railroad corporation responsible in damages to the owner whose property may be injured by fire, communicated by its locomotive engines or originating within the limits of the right of way, in consequence of the act of its authorized agents or employees, except in any cases where the property shall have been placed on the right of way of such corporation unlawfully or without its consent. It was shown that the cotton of Millett & Co. was destroyed by fire while on defendant's right of way, but not tendered for shipment, by a spark communicated from defendant's locomotive engine; but the vital question is whether the cotton was on defendant's right of way by its consent, as contemplated by the statute.

The undisputed testimony was that Millett & Co. placed the cotton on defendant's right of way under an agreement stipulating: "This cotton is deposited on the premises of the Southern Railway Company and the same remain upon the premises of this company without its consent and at your [Millett & Co.] sole risk, until tendered and accepted for shipment." Now, it is contended that, notwithstanding this express stipulation, the cotton

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was on defendant's right of way by its consent before it was tendered for shipment. We cannot think so. Millett & Co. and those in privity with them should be estopped to assert a fact which is contrary to their agreement that until tendered for shipment the cotton remains upon the right of way without defendant's consent. It is said that such an agreement is void on the ground of public policy. As it subverts a very high public policy to enforce contracts between parties *sui juris*, courts should not nullify contracts as against public policy unless the case is free from all reasonable doubt. The rule is that "a contract is not void as against public policy unless it is injurious to the interest of the public or contravenes some established interest of society." What interest of the public is injuriously affected by the agreement in question? Millett & Co. had no right as a member of the public to place cotton on defendant's premises, unless tendered for shipment, except by agreement with defendant, and defendant owed no duty to the public or to Millett & Co. to allow cotton to be placed on its right of way, except for shipment. A different question would be present if Millett & Co. had the right as a member of the public to place cotton on defendant's right of way, independent of an agreement. The status of the cotton on the right of way, being fixed by the agreement alone, must be determined by the agreement alone. If it be true that the cotton was on defendant's premises by its consent on condition, the owner cannot cling to the consent and repudiate the condition upon which it was given, for that would be like a consent obtained by fraud or deception which is no consent.

The authorities generally hold that a contract by a railroad corporation is not against public policy because it exempts from liability for fires, even negligently communicated by its agents or defective instrumentalities to property placed by the owner upon railroad premises, not as a patron dealing with the company as a common carrier, but by virtue of the special agreement. *Griswold v. Illinois Central R. R. Co.*, 90 Iowa, 265, 57 N. W. 843, 24 L. R. A. 647; *Hartford F. Ins. Co. v. Chicago, M. & St. R. Co.*, 70 Fed. 201, 17 C. C. A. 62, 30 L. R. A. 193; *Id.*, 20 Sup. Ct. 33, 175 U. S. 91, 44 L. Ed. 84, following the rule established by the state court in the *Griswold Case*. *Stephens v. Southern Pacific Co.*, 109 Cal. 86, 41 Pac. 783, 29 L. R. A. 751, 50 Am. St. Rep. 17; *Greenwich Ins. Co. v. Louisville & Nashville R. R. Co.*, 112 Ky. 598, 66 S. W. 411, 67 S. W. 16, 56 L. R. A. 477, 99 Am. St. Rep. 313; *Osgood v. Central Vermont R. Co.*, 77 Vt. 334, 60 Atl. 137, 70 L. R. A. 930; *Mann v. Pere Marquette R. Co.*, 135 Mich. 210, 97 N. W. 721. These cases combat the view that the public has an interest in the contract, because it tends to induce negligence in the equipment and operation of the locomotives. The contract in this case is not to do an act prohibited by

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statute or which is contrary to the public policy as declared by a statute, but is the admission by both parties of a fact which takes the case out of the statute, viz, that the cotton was not upon the right of way with the consent of defendant until tendered for shipment.

Under the foregoing views, it was error to refuse to direct a verdict for defendant and to refuse the motion for new trial.

The judgment of the circuit court is reversed.

MERCER v. CINCINNATI NORTHERN R. CO.

(Supreme Court of Michigan, March 17, 1908.)

[115 N. W. Rep. 733.]

Carriers—Carriage of Passengers—Personal Injuries—Setting Down Disabled Passengers.*—Where a passenger who, by reason of physical disability, is unable safely to leave the car unassisted, explains her condition to the conductor on surrendering her ticket, who promises to assist her, the company is negligent if such assistance is not given, and will be liable for injuries sustained in her attempt to leave the car unassisted on arrival at her destination, and failure of the company to furnish her assistance.

Same—Contributory Negligence—Alighting from Train—Question for Jury.—Plaintiff, a passenger who was unable because of physical disability to leave the car safely, secured the promise of the conductor to assist her. On arriving at her station after dark, she walked to the car platform and waited some time for assistance, but it was not given her, and a child who was with her attempted to get assistance, but failed. Held, that whether plaintiff was negligent in attempting to alight unassisted was a question for the jury.

Damages—Personal Injuries—Pleading and Proof.—In an action against a carrier for injuries to a passenger, the declaration alleged that "she slipped and fell, and was severely sprained and wrenched in the joints and cords of her left leg, and the bones thereof were injured." Held, that testimony as to the injury to her hip was admissible.

Error to Circuit Court, Jackson County; Clement Smith Judge.

Action by Flora A. Mercer against the Cincinnati Northern Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

*See foot-notes appended to Illinois Cent. R. Co. v. Allen (Ky.), 20 R. R. R. 49, 43 Am. & Eng. R. Cas., N. S., 49, where all the authorities on the subject in this series preceding them are collected; foot-notes appended to Williams v. Louisville & N. R. Co. (Ala.), 25 R. R. R. 92, 48 Am. & Eng. R. Cas., N. S., 92.

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Argued before BRANT, C. J., and MONTGOMERY, OSTRANDER, HOOKER, and CARPENTER, JJ.

Wilson & Cobb and A. L. Clark, for appellant.

Thomas E. Barkworth (Richard Price, of counsel), for appellee.

CARPENTER, J. December 24, 1902, at Jackson, in this state, plaintiff, accompanied by her 10 year old daughter, took passage on defendant's train for Alvordton, Ohio. Shortly before that time she had suffered a slight injury to the cords of her left leg, which somewhat impeded her movements. Before boarding the train, plaintiff's husband stated her condition to the conductor, and obtained his promise to assist her in alighting at Alvordton. Plaintiff herself subsequently, upon surrendering her ticket, told the conductor that she would need assistance in alighting, "and asked him if he would please assist me, and he told me he would. He would see I got off all right." When the train reached Alvordton, plaintiff and her daughter carried their hand parcels out on the platform, which was covered with snow. They "stood there quite a few minutes." It was dark. There was no one there to assist them to alight. Her daughter got off and went away to procure assistance. She was gone some time, and the plaintiff, as she testifies, "got very nervous. I thought I must get off. * * * I waited as long as I thought I ought to." She therefore attempted to alight without assistance, fell from the steps, and was injured. She brought this suit to recover compensation, and obtained a verdict and judgment in the circuit court.

1. The most important question in the case is this: Was defendant under any obligation to assist plaintiff to alight? The law upon this subject is in our judgment correctly stated by the Supreme Court of Minnesota in *Croom v. Chicago, etc., R. Co.*, 52 Minn. 296, 53 N. W. 1128, 18 L. R. A. 602, 38 Am. St. Rep. 557, speaking through Justice Mitchell, as follows: "A railroad is not bound to turn its cars into nurseries or hospitals, or its employees into nurses. If a passenger, because of extreme youth or old age, or any mental or physical infirmities, is unable to take care of himself, he ought to be provided with an attendant to take care of him. But, if the company voluntarily accepts a person as a passenger, without an attendant, whose inability to care for himself is apparent or made known to its servants, and renders special care and assistance necessary, the company is negligent if such assistance is not afforded. In such case it must exercise the degree of care commensurate with the responsibility which it has thus voluntarily assumed, and that care must be such as is reasonably necessary to insure the safety of the passenger, in view of his mental and physical condition. This is a

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duty required by law as well as the dictates of humanity." In that case plaintiff, an aged man, feeble and infirm in mind and body, undertook to travel alone from Savanna, Ill., to Wells, Minn. His condition was known to defendant's employees when he was accepted as a passenger. He was injured because he did not receive needed assistance when he was changing cars at Austin, Minn. In accordance with the rule of law above stated defendant was held responsible. See, also, *Southern Railway Co. v. Hobbs*, 118 Ga. 227, 45 S. E. 23, 63 L. R. A. 68; *Foss v. Boston & Maine R. Co.*, 66 N. H. 256, 21 Atl. 222, 11 L. R. A. 367, 49 Am. St. Rep. 607; *Thompson on Negligence*, § 2846; *Hutchinson on Carriers* (3d Ed.) §§ 992, 1127.

2. It is contended that plaintiff was guilty of contributory negligence in endeavoring to alight. Many of the cases relied upon by defendant are those where a passenger attempted to alight from a moving train. This case is very different from those. The risk was obviously much less. Upon this subject we quote with approval from the brief of plaintiff's counsel: "Plaintiff, expecting, as she had a right to expect, that defendant's employees would meet her and assist her in alighting, had made her way to the platform of the car. The trainmen had left. It was dark. Her little girl, stepping off to find an employee, had disappeared. If the train started, she was very likely to be thrown down and injured. If she went back to resume her seat, she would have to leave her daughter and run the chance of falling incident to that movement. If she attempted to get down, as she did, she faced the danger incident to that. In any direction there was danger." Under these circumstances, plaintiff was not, as the trial court said, "negligent if she chose the alternative which proved to be the more dangerous." *Fehnrich v. Railroad Co.*, 87 Mich. 607, 49 N. W. 890. The question of contributory negligence was one for the jury to decide, and the trial court submitted it to them with appropriate instructions.

3. Rulings upon the admission of testimony. Plaintiff testified: "I have a great deal of trouble with my back and hip. My back pains me a great deal, and my head pains me much of the time. When I walk, my hip feels as though something was twisted." Defendant complains because the court refused "to strike out all testimony in relation to the injury to the hip, for the reason that no such injury is averred in the declaration." The declaration does aver: "She slipped and fell, and was severely sprained and wrenched in the joints and cords of her left leg, and the bones thereof were injured." We think this a sufficient averment to permit the introduction of the testimony.

No other question demands discussion. The judgment is affirmed.

BIRMINGHAM RY., LIGHT & POWER CO. v. LEE.

(Supreme Court of Alabama, Dec. 19, 1907.)

[45 So. Rep. 164.]

Trial—Instructions—Effect of Evidence.—An instruction that “if the jury were “reasonably satisfied” from the evidence of certain facts, which there was evidence tending to prove, plaintiff was entitled to recover, was not objectionable as on the effect of the evidence.

Damages—Instructions.—It is proper to instruct that the jury cannot, in awarding damages, go beyond the amount claimed in the complaint.

Same.—In an action for injuries to a passenger, there was no error in an instruction: “It comes to you in the nature of a warning that you shall be careful, that you shall give her ample compensation for the wrong that has been done her, if you find one has been done.”

Trial—Instructions—Form and Language.—An instruction that if the jury found certain facts, which there was evidence tending to show, plaintiff was entitled to recover, was not erroneous, because the opening of the instruction was not predicated on “the belief of the evidence” by the jury.

Same—Requests—Further or More Specific Instructions.—If a party deemed an instruction misleading, because the opening of it was not predicated on the “belief of the evidence” by the jury, it was open to him to ask any explanatory charge.

Carriers—Ejection of Passenger—Action—Instructions.*—In an action for wrongful ejection of a passenger, an instruction that in assessing damages the jury were authorized, in their best judgment, to award a fair and reasonable compensation for any physical pain or mental suffering that they might believe plaintiff to have suffered, and also as a punishment to defendant, if they believed such damages should be awarded, was not improper.

Same—Damages.†—Where the wrongful ejection of a passenger is accompanied by willfulness, exemplary damages may be awarded.

*For the authorities in this series on the subject of the right to recover damages for the mental suffering of a passenger wrongfully ejected, see foot-notes appended to *Georgia, etc., Co. v. Baker* (Ga.), 13 R. R. R. 259, 36 Am. & Eng. R. Cas., N. S., 259, where all those preceding it are collected or referred to; foot-notes appended to *Lindsay v. Oregon Short Line R. Co.* (Idaho), 24 R. R. R. 616, 47 Am. & Eng. R. Cas., N. S., 616; *Southern Ry. Co. v. Hawkins* (Ky.), 20 R. R. R. 21, 43 Am. & Eng. R. Cas., N. S., 21.

†For the authorities in this series on the question whether exemplary or punitive damages may be recovered against the carrier for the ejection of a passenger, see *Atlanta, etc., Co. v. Potts* (Ga.), 24 R. R. R. 621, 47 Am. & Eng. R. Cas., N. S., 621 (punitive damages for ejection from moving train); note, 12 Am. & Eng. R. Cas., N. S.,

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Trial—Instructions—Misleading Instructions—Singling Out Phase of the Evidence.—A requested instruction that it was the duty of the jury to so reconcile the testimony of all the witnesses as to arrive at the conclusion that they had all told the truth, if such could be done, and that, if the jury were unable to so reconcile the testimony, they must determine which witnesses had told the truth, and in determining such matter might consider the interest of any witnesses in the trial, was misleading, as some of the witnesses might have sworn incorrectly without being amenable to the charge of having sworn falsely.

Carriers—Ejection of Passenger.—The fact that, while plaintiff was being wrongfully ejected on the ground that she had not paid her fare, another passenger offered to pay the fare and plaintiff would not permit it, did not preclude plaintiff from recovering for all injuries and damages suffered after her refusal to permit such payment.

Appeal from City Court of Birmingham; Charles A. Senn, Judge.

Action by Georgia Lee against the Birmingham Railway, Light & Power Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

The nature and character of the action and pleadings, the tendencies of the evidence, and the excepted to portions of the

130, et seq.; note, 10 Am. & Eng. R. Cas., N. S., 269; Illinois Cent. R. Co. v. Harper (Miss.), 10 R. R. R. 612, 33 Am. & Eng. R. Cas., N. S., 612 (exemplary damages for ejection of female passenger from wrong train at night, where conductor refused to listen to her explanations); Ammons v. Southern Ry. Co. (N. Car.), 19 R. R. R. 724, 42 Am. & Eng. R. Cas., N. S., 724 (exemplary damages for ejection of passenger for refusal to pay fare, when, and when not, recoverable); Choctaw, etc., Co. v. Hill (Tenn.), 8 R. R. R. 776, 31 Am. & Eng. R. Cas., N. S., 776 (exemplary damages for ejection of passenger, instruction not objectionable because of use of clause, "and when the act is done in the strict line of duty of the conductor"); Yazoo, etc., Co. v. Rodgers (Miss.), 2 R. R. R. 161, 25 Am. & Eng. R. Cas., N. S., 161 (general rule); Peterson v. Middlesex, etc., Co. (N. J.), 15 R. R. R. 672, 38 Am. & Eng. R. Cas., N. S., 672 (punitive damages, for ejecting passenger wrongfully and with unnecessary violence, could not be recovered against carrier, where he did not participate in the wrongful acts, either by authorizing or approving them); Norman v. Southern Ry. Co. (S. Car.), 8 R. R. R. 307, 31 Am. & Eng. R. Cas., N. S., 307 (punitive damages for ejecting passenger attempting to ride on expired ticket, question for jury); Dagnall v. Southern Ry. Co. (S. Car.), 15 R. R. R. 59, 39 Am. & Eng. R. Cas., N. S., 59 (punitive damages for wanton and willful ejection); Southern, etc., Co. v. Compton (Miss.), 18 R. R. R. 269, 41 Am. & Eng. R. Cas., N. S., 269 (punitive damages may be awarded to female passenger who was rudely ejected from street car, and compelled to walk some distance in the mud, because of her refusal to comply with an unwarranted demand of the conductor that she change her seat in the car); Lexington Ry. Co. v. O'Brien (Ky.), 18 R. R. R. 67, 41 Am. & Eng. R. Cas., N. S., 67 (punitive damages recoverable if plaintiff was recklessly and

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court's oral charge are sufficiently stated in the opinion of the court. The seventh assignment is as follows: "The court below erred in charging the jury orally as follows: 'It comes to you in the nature of a warning that you shall be careful that you shall give her ample compensation, ample damages for this wrong that has been done her, if you find one has been done her.'"

The following charges were given at request of plaintiff:

(1) I charge you, gentlemen of the jury, that if you believe from the evidence that the plaintiff paid the conductor ten cents fare from Bessemer to Hillman, then your verdict must be in favor of the plaintiff. (2) I charge you gentlemen of the jury, that if the plaintiff paid the conductor her fare from Bessemer to Hillman, then the conductor committed an assault and battery upon the plaintiff, for which the defendant is liable in any damages the plaintiff may have suffered, if any, not exceeding the amount claimed in the complaint; and in assessing damages the jury are authorized, in their best judgment, to award a fair and reasonable compensation for any physical pain or mental suffering that the jury believe the plaintiff suffered, and also as a punishment to the defendant, if the jury believe such damages should be awarded."

The court refused the following charges requested by the defendant: (2) General affirmative charge as to second count.

wantonly thrown from car, even though act was not inspired by actual malice or ill will); *Richardson v. Atlantic Coast Line R. R.* (S. Car.), 18 R. R. R. 349, 41 Am. & Eng. R. Cas., N. S., 349 (punitive damages were not recoverable for ejection of passenger, who had been directed by person in uniform to wrong train, and was ejected from it for refusal to pay additional fare); *Seaboard Air Line Ry. v. O'Quin* (Ga.), 19 R. R. R. 106, 42 Am. & Eng. R. Cas., N. S., 106 (punitive damages were recoverable for forcible expulsion of passenger from train by conductor or other employees, without excuse); *Southern Ry. v. Hawkins* (Ky.), 20 R. R. R. 21, 43 Am. & Eng. R. Cas., N. S., 21 (punitive damages, when not recoverable for ejection of passenger); *Baltimore, etc., Co. v. Kirby* (Md.), 18 Am. & Eng. R. Cas., N. S., 248 (passenger wrongfully on express train kicked therefrom while it was moving); *Haver v. Central R. Co.* (N. J.), 17 Am. & Eng. R. Cas., N. S., 490; *Cowen v. Winters* (C. C. A.), 16 Am. & Eng. R. Cas., N. S., 107 (exemplary damages for implied malice in ejecting passenger); *Lexington, etc., Co. v. Lyons* (Ky.), 11 Am. & Eng. R. Cas., N. S., 212 (exemplary damage); *Louisville & N. R. Co. v. Bay* (Tenn.), 11 Am. & Eng. R. Cas., N. S., 174 (exemplary damages, pleading); *Smith v. Philadelphia, etc., Co.* (Md.), 10 Am. & Eng. R. Cas., N. S., 264 (exemplary damages where malice in ejecting is shown); *Allen v. Wilmington & W. R. Co.* (N. Car.), 8 Am. & Eng. R. Cas., N. S., 257 (punitive damages were not recoverable where passenger was ejected for failure to pay extra fare); *Atchison, etc., R. Co. v. Long* (Kan. App.), 7 Am. & Eng. R. Cas., N. S., 774 (exemplary damages recoverable where carrier's employees were grossly and wantonly negligent of the passenger's rights); *Atlanta Consol. St. R. Co. v. Keeny* (Ga.), 5 Am. & Eng. R. Cas., N. S., 305 (conductor's use of insulting language when ejecting passenger); note, 2 Am. & Eng. R. Cas., N. S., 164, et seq.

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Charges 1, 3, 4, and 5 were the affirmative charges as to the other counts. "(6) You cannot award plaintiff any damages in this cause by reason of any miscarriage she may have had. (7) There is no evidence in this case that the conductor's alleged wrong to plaintiff caused or aided in causing the plaintiff's miscarriage. (8) It is the duty of the jury to so reconcile the testimony of all the witnesses as to arrive at the conclusion that they have all told the truth, if such can be done. If the jury are unable to so reconcile the testimony, they must determine which witnesses have told the truth, and in determining which witnesses have told the truth you may consider what interest, if any, such witnesses may have in the result of the trial. (9) If you are reasonably satisfied from the evidence in the case that before any injury and damages were suffered by the plaintiff another person on the car offered to pay her fare, and plaintiff prevented or refused to allow such person to pay said fare, and that the conductor was ready and willing to accept such fare from such person and permit plaintiff to continue on her journey, and further believe from the evidence that all the injury and damage suffered by plaintiff arose after her refusal to allow such person to pay her fare, then she can be awarded only such damages as were sustained by her prior to the offer to pay her fare by such person."

Tillman, Grubb, Bradley & Morrow, for appellant.
W. S. Lewis and James M. Russell, for appellee.

HARRALSON, J. The plaintiff, appellee, recovered a judgment for \$300 against the defendant, the Birmingham Railway, Light & Power Company, for wrongful assault alleged to have been committed upon her by defendant's conductor, while plaintiff was a passenger on one of defendant's electric cars which ran from Bessemer to Birmingham.

The contention of the plaintiff is, that she boarded one of defendant's cars at Bessemer, and paid the conductor the 10 cent fare to be carried as a passenger to a station called Hillman. She states, that she gave the conductor a 50 cent piece in silver, and he gave her back a quarter, a dime and a nickel, leaving 10 cents she paid him as fare to Hillman, which was the regular fare to that station.

The defendant's contention is, that plaintiff only paid 5 cents, the regular fare to Brown's a station between Bessemer and Hillman. After the car reached Brown's the conductor sought to collect an additional 5 cent fare from Brown's to Hillman. A dispute arose between her and him, plaintiff insisting that she paid 10 cents, and the conductor, that she had only paid him 5 cents; and the conductor stopped the car and told plaintiff that she would have to pay the 5 cents or get off the train. She re-

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fused to pay it, and the conductor took hold of her, and when it became evident he was going to eject her from the car a fellow passenger offered to pay her fare, when she told him not to do so, but the passenger paid it. The conductor, before this, took hold of her, as she testified, and dragged her to the door, inflicting on her serious personal injuries, which ended in her miscarriage soon afterwards, the plaintiff being pregnant at the time.

There was much dispute as to the amount of injuries she sustained, the evidence for plaintiff being, that she suffered great bodily harm, and that of defendant, that no such serious injuries were sustained, and that the conductor did nothing more than was necessary to eject her.

The complaint contained four counts, the first, third, and fourth, for a wrongful assault by the conductor, setting out the injuries she sustained; and the second, for wrongful, willful and intentional injuries inflicted on plaintiff.

Demurrers were interposed to the several counts, which were overruled. The defendant commendably admits these counts were good, and declines to insist on assignments of error for overruling same.

The case was tried on the plea of the general issue and special plea No. 2, of which plaintiff had the benefit, under the plea of the general issue.

We have examined the oral charge of the court to the jury. The defendant excepted to that portion of it as follows: "If you are reasonably satisfied from this evidence, that she paid this ten-cent fare, then a wrong was inflicted upon her in attempting to put her off before she got to the end of her journey. It was a wrongful ejection or attempted ejection, and for that wrong she would be entitled to damages against the company." This was not a charge, as insisted, on the effect of the evidence. The instruction was under hypothesis, "if the jury was reasonably satisfied, from the evidence, that she paid the 10-cent fare." etc. The exception to the charge was hypercritical, and taken in connection with the entire charge, the instruction seems to have been eminently correct.

Nor was there any error, in that part of the court's instruction, in its oral charge: "Of course she sues for \$1,000, and cannot recover more than that." It is always proper for the court to instruct, that the jury cannot in awarding damages go beyond the amount claimed in the complaint. Moreover, the sentence from which this excepted portion was taken, contains more than is excepted to, showing that the charge was very correct.

The same remarks are applicable to that portion of the oral charge, the basis of assignment of error No. 7.

There was no error in plaintiff's given charge No. 1. It was

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under hypothesis on conflicting evidence, which was for the determination of the jury, as the charge left it.

Nor was there error in given charge No. 2, for plaintiff. The fact that the opening of the charge is not predicated on "the belief of the evidence by the jury," is no argument against its validity. If without this the charge was deemed misleading, it was open to the defendant to ask any explanatory charge. *Hall v. Posey*, 79 Ala. 84.

The instructions as to the amount of damages mentioned in the charge were not improper. The second count was for willfulness, which there was evidence tending to show, and the jury were authorized under it, to assess exemplary damages, if they saw proper. 13 Cyc. 180. There was evidence tending to show wantonness or willfulness, and charge 2 for defendant was properly refused.

Charges 6 and 7 for defendant were in direct opposition of evidence tending to show that plaintiff miscarried on account of the injuries inflicted on her. The plaintiff so swore, and other evidence corroborated her. They were properly refused.

Charge 8 was an improper instruction. It was misleading, and singled out and stressed a particular phase of the evidence. The jury were not necessarily to determine which of the witnesses told the truth, and which swore falsely. Some of them may have sworn incorrectly, without being amendable to the charge of having sworn falsely. To tell the jury they must ascertain which of them "told the truth," was too exacting an instruction, and did not leave the jury at liberty to give due weight to their evidence, and to reject it, if they thought it erroneous as being incorrect, though not technically false.

"When there is conflict in the testimony of two witnesses which cannot be reconciled, regard must be had, in determining which one is mistaken, to the capacity of the witnesses, their respective opportunities of knowing the facts to which they depose, and the nature of the facts deposed to, as calculated to impress themselves with more or less force on the memory." *Hitt v. Rush*, 22 Ala. 563; *Cain v. Penix*, 29 Ala. 374; *Bugbee v. Howard*, 32 Ala. 718; *Collins v. Stephens*, 58 Ala. 545; 5 *Mayfield*, 264, § 30.

There was no merit in refused charge 9. If plaintiff had paid her fare to Hillman, an assault and battery, under the undisputed evidence, had been committed on her, before an outsider offered to pay her fare. Moreover, plaintiff had the right to refuse to allow this other person to pay her fare. Such payment by her consent, would have been an acknowledgment that she had not paid it, and the conductor was entitled to it, and in such case, she would have been in duty bound to refund it to this outsider. The charge was improper and misleading.

Finding no error, let the judgment below be affirmed.

Affirmed.

TYSON, C. J., and DOWELL and McCLELLAN, JJ., concur.

BIRMINGHAM RY., LIGHT & POWER CO. v. TURNER.

(Supreme Court of Alabama, Feb. 6, 1908.)

[45 So. Rep. 671.]

Carriers—Street Railways—Action by Ejected Passenger—Complaint—Sufficiency—Negligence—Transfers.—A complaint against a street railway company, averring that plaintiff was ejected from a car through a conductor's negligence in incorrectly punching a transfer given plaintiff to show his right to ride on the car from which he was ejected, sufficiently avers the negligence charged.

Same—Burden of Proof.—In an action against a street railway company for ejecting a passenger who presented an improperly punched transfer, the burden was on him to show that the conductor on the first car was bound to issue a transfer to him to the car from which he was ejected.

Same—Serviceable Transfer—Failure to Issue—Effect.*—A street railway conductor's failure to issue a serviceable transfer, when bound to do so, makes the company liable for injuries suffered by a passenger in consequence.

Trial—Objections to Testimony—Time for Making.—An objection to a question asked a witness, made after answer, is too late, where the answer is not made so quickly as to preclude a prior objection.

Carriers—Ejection of Passenger—Damages Recoverable.†—One wrongfully ejected from a street car may recover damages arising from his weak physical condition, drawn to the conductor's attention, and other damages proximately resulting from the wrong, including the expense and inconvenience to which he was put, and humiliation and indignity suffered.

*For the authorities in this series on the subject of street railway transfers, see foot-notes appended to *Hornesby v. Georgia, etc., Co.* (Ga.), 12 R. R. R. 421, 35 Am. & Eng. R. Cas., N. S., 421, where all those preceding it are collected; foot-notes appended to *DeBoard v. Camden Interstate Ry. Co.* (W. Va.), 25 R. R. R. 84, 48 Am. & Eng. R. Cas., N. S., 84; *Norton v. Consolidated Ry. Co.* (Conn.), 24 R. R. R. 437, 47 Am. & Eng. R. Cas., N. S., 437.

†See *Arnold v. Rhode Island Co.* (R. I.), 23 R. R. R. 414, 46 Am. & Eng. R. Cas., N. S., 414 (\$175 was not excessive verdict for ejection of passenger after he had presented valid transfer, it appearing that he had previously had trouble in regard to transfers at the point in question); *Georgia Ry., etc., Co. v. Baker* (Ga.), 20 R. R. R. 789, 43 Am. & Eng. R. Cas., N. S., 789 (threat to expel passenger from car who presented a transfer defective through no fault of his); *Little Rock, etc., Co. v. Winn* (Ark.), 19 R. R. R. 349, 42 Am. & Eng. R. Cas., N. S., 349 (plaintiff was not entitled, under the circumstances, to exemplary damages, where conductor improperly refused to accept transfer, and required him to pay fare or leave car), *Southern, etc., Co. v. Compton* (Miss.), 18 R. R. R. 269, 41 Am. & Eng. R. Cas., N. S., 269 (punitive damages may be awarded to female

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Same—Recovery Not Excessive.—Two hundred eighty-seven dollars was not an excessive recovery against a street railway company for wrongfully ejecting a passenger weakened by typhoid fever and compelled to walk home.

New Trial—Misconduct of Jury—Sufficiency of Showing.—Paper found in the jury room and tending to show the verdict was fixed by the quotient method, and a disputed claim that counsel appropriated paper found in the jury room, are insufficient to show the verdict was improperly reached, where the papers do not appear to have been written upon by jurors, and a juror swears that the verdict was not fixed by the quotient method.

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Action by Harry Turner against the Birmingham Railway, Light & Power Company for wrongfully ejecting a passenger. From a judgment for plaintiff, defendant appeals. Affirmed.

The nature and character of the action is sufficiently stated in the opinion. The complaint, to which demurrers were filed, is in the following language, after stating the plaintiff and defendant, and amount of damages claimed, and that the defendant was a common carrier of passengers: "That defendant carried passengers by means, among others, of two lines of street cars in Birmingham, a line known as the 'Highland Avenue Line' and the line known as the 'North and South Highland Line,' and that defendant undertook to carry passengers on both of said lines for one cash fare, paid to the conductor of the car on the first line taken by the passenger. That on that day plaintiff became a passenger on one of the cars operated by the plaintiff on the North and South Highlands line, and paid to the conductor of said car in cash the fare charged by defendant for being carried

passenger who was rudely ejected from street car, and compelled to walk some distance in the mud, because of her refusal to comply with unwarranted demand of the conductor that she change her seat); *De Board v. Camden Interstate Ry. Co.* (W. Va.), 25 R. R. R. 84, 48 Am. & Eng. R. Cas., N. S., 84 (improper rejection of transfer and refusal to pay additional fare); *Paterson v. Middlesex, etc., Co.* (N. J.), 15 R. R. R. 672, 38 Am. & Eng. R. Cas., N. S., 672 (punitive damages, for ejecting passenger wrongfully and with unnecessary violence, could not be recovered against carrier, where it did not participate in the wrongful acts, either by authorizing or approving them); *Georgia Ry., etc., Co. v. Baker* (Ga.), 13 R. R. R. 259, 36 Am. & Eng. R. Cas., N. S., 259 (injury to feelings from wrongful ejection); *Mabry v. City Elec. Co.* (Ga.), 6 R. R. R. 900, 29 Am. & Eng. R. Cas., N. S., 900 (injury to sensibilities of passenger wrongfully ejected, but not physically injured); notes and abstracts from decisions, 2 Am. & Eng. R. Cas., N. S., 161, et seq.; note, 14 Am. & Eng. R. Cas., N. S., 391 (elements of damages for ejection of passengers); note, 18 Am. & Eng. R. Cas., N. S., 45 (mental suffering of ejected passenger).

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on said car, and also on a car on said Highland Avenue line. That plaintiff received from the conductor a transfer slip or ticket, which said conductor furnished plaintiff as evidence of the right to ride on said Highland Avenue line; and, in pursuance of the contract with defendant to be carried as its passenger as aforesaid, plaintiff boarded one of the cars operated by defendant on said Highland Avenue line, to be carried as defendant's passenger thereon, and tendered defendant's conductor on the car on said Highland Avenue line said transfer slip or ticket furnished by defendant's other conductor of said car as aforesaid. Whereupon the conductor on the Highland Avenue line ejected plaintiff from said car in the presence of divers persons, etc. [Here follows a statement of his injuries and damages.] And plaintiff alleges that he was ejected as aforesaid and suffered said injuries and damages by reason and as a proximate consequence of the negligence of defendant by and through the said conductor of said car on the North and South Highlands line in and about furnishing plaintiff with said transfer slip or ticket, which was improperly marked or punched." The second count is a repetition of the first count down to and including the damages alleged therein, with the averment that the conductor on said Highland Avenue line wrongfully ejected plaintiff from the car, and as a proximate consequence thereof he suffered the injuries and damages complained of.

Demurrers were assigned jointly and separately to the counts above set out, raising the question of the uncertainty and indefiniteness of the allegation of negligence; that it did not appear that plaintiff was wrongfully ejected; that it appeared that plaintiff was rightfully ejected therefrom; it is not averred that it was defendant's duty to allow or permit plaintiff to ride on the Highland Avenue line by virtue of the transfer slip furnished him as aforesaid; it does not appear wherein said transfer ticket was improperly marked or punched; it does not appear the plaintiff was aware that the transfer ticket or slip was improperly marked or punched when he boarded said car. These demurrers were overruled. There was judgment for plaintiff in the sum of \$287, and defendant appeals.

Tillman, Grubb, Bradley & Morrow, for appellant.

Bowman, Harsh & Beddow, for appellee.

MCCLELLAN, J. This action is by a passenger for an alleged wrongful ejection. The count of the complaint on which the trial was had charged the negligence resulting in plaintiff's ejection to have been that of a conductor of defendant (appellant) in incorrectly marking or punching a transfer ticket, which was by him given plaintiff in order to prove his right to another conductor of another line of street railway of defendant to transportation as upon the undertaking to carry plaintiff for and in

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consideration of one fare over both lines. The count is sufficiently definite, in its averments descriptive of the negligence charged, under the liberal rule with which such averments have long been treated in this court. *Southern Ry. Co. v. Burgess*, 143 Ala. 364, 42 South. 35. The ground of demurrer taking this objection was properly overruled.

The count avers an undertaking to carry plaintiff over both lines for one fare; and to sustain this averment it was essential to his recovery to establish to the reasonable satisfaction of the jury that it was the duty of the conductor of the first car to issue to him a transfer ticket to the second car to which he desired to transfer. If it was his duty so to do, then, of course, his authority to that end existed, and a failure to issue a serviceable transfer ticket would render the defendant liable for injuries suffered in consequence. An affirmance of such authority would conclude the existence of the duty stated, and a denial of it would refute the existence of such duty. The plaintiff testified, in part, as follows: "I boarded the North and South Highlands car and paid my fare. Before that time, and until and at this time, the defendant charged five cents for both fares, giving a transfer from one line to the other. They were issuing transfers then." Opposed to this testimony, which tended to show the custom, authority, and duty in the premises, however subsequent testimony given by the plaintiff might be deemed to have qualified the conclusion deducible from the statement quoted, was that of officers of the defendant who explicitly denied this custom, authority, and duty in respect of the issuance of transfer tickets over or between these lines. This obvious conflict compelled the submission of the inquiry to the jury, which was done. A careful review of the testimony, on the vital issue stated, does not justify us, we think, in disturbing the verdict rendered on the ground of its want of substantial support in the evidence.

The question to the witness Wood as to the character of tickets used by the defendant at that time appears to have been answered before the objection was made; hence it came too late. *Washington's Case*, 106 Ala. 58, 17 South. 546. Where the answer is made so immediately upon the conclusion of the question as to deny opportunity to object, manifestly a different rule would obtain.

Whether the damages assessed are excessive must, of course, be referred to the evidence adduced. Apart from the elements of damages specially claimed on account of the physical condition of the plaintiff at the time of his ejection, and which were brought by him to the attention of the conductor demanding his departure from the car, the measure and elements of damages generally recoverable in such cases are stated in *L. & N. R. R. Co. v. Hine*, 121 Ala. 234, 25 South. 857. The testimony shows

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plaintiff to have had at the time typhoid fever, to be weak, and to have fainted during that afternoon. While the physician attending him testified to the absence of any aggravation of the malady by the additional walk taken after and because of the ejection, yet he also testified that quiet was prescribed for persons afflicted with that disease. The plaintiff testified to his own discomfort, in his weakened condition, resulting from the exertion incident to the walk to his home. Notwithstanding the fact that he had exerted himself, during that afternoon, to such an extent as to possibly induce the conclusion contrary to his contention and testimony, we cannot affirm, under the facts stated, that the damages awarded are excessive. The amount given finds support in the evidence, and there is nothing present indicative of a disposition to oppress.

The ground of the motion for a new trial, that the amount of the verdict was improperly arrived at, was not sustained in proof. The slips of paper found in the jury room were not shown to have been written upon or made by the jury; and, on the contrary, the affidavit of Barbour, a jurymen, is to the effect that the verdict was not fixed by the quotient method. The alleged appropriation by counsel, and a denial of it by opposing counsel on demand, of the paper found in the jury room, certainly, in the absence of proof that the jury used the paper, or the figures on it, in reaching a verdict, was no ground for a new trial, whatever penalty, if the charge were sustained, should have been inflicted by the court in the premises.

We have considered all assignments insisted on in brief of counsel, and find no error in the record. The judgment is affirmed.

Affirmed.

TYSON, C. J., and DOWELL and ANDERSON, JJ., concur.

MORRILL v. MINNEAPOLIS ST. RY. CO.

(Supreme Court of Minnesota, Feb. 21, 1908.)

[115 N. W. Rep. 395.]

Carriers—Carriage of Passengers—Performance of Contract—Transfers.—A passenger on a street car, who has paid his fare, is by virtue of that fact entitled to ride to the end of a line to which, under the city ordinances, he is entitled to be transferred. The contract of carriage is complete when the fare is paid.

Same—Duty to Give Proper Transfer.—Upon demand by the passenger it is the duty of the conductor to give a proper transfer slip, such as should be accepted by the conductor of the car to which the passenger is transferred.

Same.*—The duty to see that a proper transfer slip is given rests upon the conductor, and not upon the passenger.

Same—Evidence of Right to Ride.—The transfer slip is not the sole and exclusive evidence of the passenger's right to ride.

Same.*—No absolute duty rests upon the passenger to examine the transfer slip when it is delivered to him and see that it is for the proper car and is properly punched. He may rely upon the inference that the conductor has properly done his work and performed the duty imposed upon him.

Same—Actions—Nature and Form—Damages—Wrongful Ejection—Necessity for Actual Force—Duty to Leave.†—A passenger entered a crowded Interurban car in the city of Minneapolis, paid her fare, and asked for a transfer to the Chicago Avenue line. A transfer slip was given her by the conductor as the car approached the transfer point. Without examining the slip, the passenger entered the Chicago Avenue car, which was then waiting. Upon presenting the slip it was refused by the conductor of the Chicago Avenue car, and upon her refusal to pay another fare she was ejected from the car. She acted in good faith, and informed the conductor of the circumstances under which she received the slip. Held that:

(a) She can maintain an action in tort against the railway company for the damages resulting from her expulsion from the car, and is

*For the authorities in this series on the subject of street railway transfers, see foot-notes appended to *Hornesby v. Georgia, etc., Co.* (Ga.), 12 R. R. R. 421, 35 Am. & Eng. R. Cas., N. S., 421, where all those preceding it are collected; foot-notes appended to *De Board v. Camden Interstate Ry. Co.* (W. Va.), 25 R. R. R. 84, 48 Am. & Eng. R. Cas., N. S., 84; *Norton v. Consolidated Ry. Co.* (Conn.), 24 R. R. R. 437, 47 Am. & Eng. R. Cas., N. S., 437.

†See second foot-note appended to preceding case.

For the authorities in this series on the right of a passenger to resist ejection, see *Paterson v. Southern Pac. Co.* (Tex. Civ. App.), 2 R. R. R. 156, 25 Am. & Eng. R. Cas., N. S., 156 (resistance to en-

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not limited to an action for damages for breach of the contract to carry.

(b) The damages recoverable in such cases are such as naturally result from the wrongful act of the conductor in ejecting the passenger, taking into consideration the humiliation suffered, and including such special damages as are alleged and proven.

(c) The right of action is complete when the passenger is ordered to leave the car under circumstances which show that force will be used unless the order is obeyed. Actual force need not be used.

(d) When a passenger is thus ordered to leave a street car, it is his duty to comply with the order quietly and without insisting upon the application of actual force. If he resists the efforts of the company's agent to eject him, he can recover no additional damages resulting from the use of such force as is reasonably necessary to accomplish the purpose.

(Syllabus by the Court.)

Appeal from District Court, Hennepin County; John Day Smith, Judge.

Action by Clara Morrill, formerly Clara Calkins, against the Minneapolis Street Railway Company. Verdict for plaintiff. From an order denying a motion for judgment for defendant notwithstanding the verdict or for a new trial defendant appeals. Affirmed.

Ino. W. Arctander and Munn & Thygeson, for appellant.
Geo. W. Armstrong, for respondent.

ELLIOTT, J. This action was brought against the Minneapolis Street Railway Company to recover damages alleged to have

hance damage); Pittsburgh, etc., R. Co. v. Russ (C. C. A.), 2 Am. & Eng. R. Cas., N. S., 141 (passenger wrongfully ejected from train may recover for increased injuries sustained by him because of sufficient resistance on his part to denote that he is being removed against his will; and if there is no right to eject a passenger, he may resist the ejection with all needful force.

As to the right to use force in ejecting a passenger, see extensive note, 22 Am. & Eng. R. Cas., N. S., 924; McGarry v. Holyoke St. Ry. Co. (Mass.), 5 R. R. R. 294, 28 Am. & Eng. R. Cas., N. S., 294 (where a passenger on a street car refused to pay his fare and made the conductor understand he would resist being put off, the latter was justified in using force in putting him off after for the third time telling him he must pay his fare or get off); Moore v. Nashville, etc., Ry. (Ala.), 8 R. R. R. 767, 31 Am. & Eng. R. Cas., N. S., 767 (force that may be used where passenger is disorderly); Central of Georgia R. Co. v. Motes, 7 R. R. R. 161, 30 Am. & Eng. R. Cas., N. S., 161 (passenger could not complain of the use of force by provoked employee when enforcing regulation against sleeping in depot); McGhee v. Reynolds (Ala.), 22 Am. & Eng. R. Cas., N. S., 17 (sufficiency of allegation as to use of force in ejecting passenger).

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been caused by the wrongful and illegal expulsion of the plaintiff from one of its cars. The jury returned a verdict in favor of the plaintiff for \$100, and the appeal is from an order denying a motion for judgment for the defendant notwithstanding the verdict or for a new trial.

There was evidence tending to show that on April 5, 1906, the plaintiff entered one of the defendant's cars of the Interurban line near the Great Western Depot on Washington Avenue South in the city of Minneapolis. The car was crowded. The conductor collected from her a fare of five cents, which entitled her to be carried as a passenger to the end of any line of cars to which she was entitled to be transferred as provided by the city ordinances. The interurban line of cars crossed the line known as the Eighth & Central at Hennepin avenue, and this was a regular transfer point from one line to the other. As the Interurban car approached Hennepin avenue, the plaintiff, with a number of other passengers, moved towards the rear end of the car, where the conductor was handing out transfer slips to those who were about to alight. She asked the conductor for a transfer to the Eighth & Central line, and in response to such request he gave her a transfer, which she accepted without examination. She then passed hurriedly across the street and entered a car which was standing at the crossing. The conductor intended to give her a transfer which would entitle her to ride on the car which she entered, but when it was presented on the Eighth & Central car the conductor refused it, and, upon her refusal to pay another fare, ejected her from the car. When she presented the transfer, the conductor examined it and said, "This is no good," after which he tore it up and threw it upon the floor. The plaintiff informed the conductor of the circumstances under which she had received the slip, and demanded that he accept the evidence which she presented and allow her to ride on the car. The defendant's evidence tended to show that the plaintiff presented an old transfer slip, which had been issued on another line on the previous day; but upon the issues of fact the jury found in favor of the plaintiff, and we must assume for the purposes of this appeal that the facts were as stated by the plaintiff and her witnesses.

The record presents the very important and interesting question of the liability of a street railway company for damages for the expulsion by one of its agents of a passenger who in good faith tenders a transfer slip which appears upon its face to be invalid, when such apparent invalidity was caused by the negligent act of another of the company's agents. The frequency with which this question arises in large cities under modern conditions makes it desirable that the subject should receive full and careful consideration. The right of a street railway company to make rea-

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sonable rules to facilitate its business and protect itself from imposition and fraud is questioned by no one. If such rules do not impose unreasonable and unnecessary burdens and restrictions upon the public, and are consistent with the rights of the public to transportation, they will be enforced by the courts. Clarke, Accident Law, § 81; Booth, Street Railways, § 337; Nellis, Street Surface Roads, § 8; 4 Elliott, Railroads (2d Ed.) § 1576. It is also conceded that a rule which requires transfer checks is reasonable. But it is the duty of the carrier to furnish the passenger who has paid his legal fare with a correct and valid transfer check. If the conductor, in response to a request, delivers a check which is void or irregular upon its face, and for that reason is refused when presented to another conductor, there is a breach of a valid contract to carry the passenger to his place of destination; and, if the passenger is ejected from the car, the company is liable for the breach of the contract. So far the authorities are practically in accord, but there is great diversity of opinion as to whether an action in tort will lie for the wrongful expulsion. Clarke, Accident Law, § 83.

Upon the authority of one line of cases the appellant contends that, when a passenger receives a transfer slip, it is his duty to examine it and see if a mistake has been made by the conductor; that the transfer slip is the sole and conclusive evidence, as between the passenger and the second conductor, of the right of the passenger to ride on the second car; that the conductor can look only to the transfer slip for the evidence of the passenger's right, and may not consider or be governed by any statement or explanation made by the passenger. The result is that, if the transfer is not on its face such as to entitle the passenger to ride on the car, it is the right and duty of the conductor to require the payment of another fare, and upon refusal to eject the passenger from the car. If this view is correct, it necessarily follows that the passenger who is thus ejected has no right of action against the company to recover damages for the wrongful expulsion. On the other hand, the respondent contends, and the trial court in effect held, that a passenger may rightfully rely upon the acts and statements of the first conductor, whose duty it is to give a valid transfer; that it is immaterial that the company's acts are the acts of different agents; that it is liable for the acts of each agent, and therefore an innocent passenger, who is wrongfully ejected, may recover the resulting damages from the company in an action of tort.

1. As the authorities in other jurisdictions are conflicting, they have been examined with care, in order to discover, if possible, a reasonable and practical rule which will protect the legal rights of individuals without seriously interfering with the business of the carriers. Numerous cases upon both sides of the controversy

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and illustrating its various phases will be found collected in a note to *Sprenger v. Tacoma Traction Company*, 15 Wash. 660, 47 Pac. 17, in 43 L. R. A. 706. Regardless of minor differences of theory, these cases fall naturally into two groups, one of which places the primary stress upon the right of the passenger, while the other emphasizes the importance of protecting the right of the carrier to make and enforce reasonable rules and regulations for the orderly and profitable conduct of its business. Probably the leading case of the first group or class is *Bradshaw v. South Boston Railway*, 135 Mass. 407, 46 Am. Rep. 481, in which it was held that a passenger who accepts a wrong transfer from a conductor, and without reading it presents it upon the next car, has no cause of action in tort against the carrier for the damages resulting from his ejection upon his refusal to pay another fare. The duty of the conductor, the representative of the carrier, to give a proper transfer, is treated as a negligible factor. The burden of seeing that the carrier's agent complies with the rule of the company and delivers a proper transfer slip is thrown upon the passenger, without reference to whether, because of defective senses or inadequate knowledge, he is able to read or decipher the characters and designs which commonly appear upon transfer slips. With reference to the claim that the conductor should attach some importance to the statements of the passenger, the court said: "The conductor of a street railway car cannot reasonably be required to take the mere word of a passenger that he is entitled to be carried by reason of having paid a fare to the conductor of another car, or even to receive and decide upon the verbal statements of others as to the fact. The conductor has other duties to perform, and it would often be impossible for him to ascertain and decide upon the right of the passenger, except in the usual, simple, and direct way." The court does, however, recognize the fact that a passenger who has been misled by the carelessness of the first conductor is entitled to some consideration. "It is easy to perceive," said Mr. Justice Allen, "that in a moment of irritation or excitement it may be unpleasant for a passenger who has once paid his fare to submit to an additional exaction. But, unless the law holds him to do this, there arrives at once a conflict of rights. His right to transportation is no greater than the right and duty of the conductor to enforce reasonable rules, and to conform to reasonable and settled customs and practices, in order to prevent the company from being defrauded; and a forcible collision might ensue. The two supposed rights are in fact inconsistent with each other. If the passenger has an absolute right to be carried, the conductor can have no right to require the production of a ticket or the payment of a fare. It is more reasonable to hold that for the time being the passenger must bear the burden which results from his failure to

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have a proper ticket." That is, the passenger must bear the entire burden resulting from the negligence of one of the agents of the company, in order that another agent of the company may not be embarrassed in his work of enforcing the rules and regulations of the company, which rest upon the assumption that the first agent has done his duty. The absolute right of the passenger, who has paid his fare and has in all ways complied with the terms of his contract, to ride to his destination and be furnished by the company with the evidence necessary to enable him to do so, is regarded as of no greater importance than the duty of an agent of the company to enforce reasonable rules necessary for the ordinary conduct of its business. In *Dixon v. New England Railroad*, 179 Mass. 242, 60 N. E. 581, it is said that "the passenger's right to transportation is no greater than the right and duty of the conductor to enforce reasonable rules." See, also, *Crowley v. Fitchburg Ry.*, 185 Mass. 279, 70 N. E. 56.

Another leading case is *Frederick v. Railway Co.*, 37 Mich. 342, 26 Am. Rep. 531. This is not a street railway case; but it is not apparent that any distinction can be made in principle between ordinary railways carrying passengers and street railways. The defendant's ticket agent issued a ticket covering a shorter distance than that for which the passenger asked and paid. The purchaser failed to read the ticket, and after having ridden the distance which was authorized by the ticket refused to pay the fare for the rest of the way to his destination, he was ejected from the train. It was held that his only remedy was an action for a breach of contract, and that no action would lie for damages for the tort. The course of the decisions in Michigan has been somewhat uncertain, and it has been generally understood that the doctrine of the *Frederick Case* was abandoned in *Hufford v. Railroad Co.*, 64 Mich. 631, 31 N. W. 544, 8 Am. St. Rep. 859 (s. c. 53 Mich. 118, 18 N. W. 580). In the recent case of *Brown v. Rapid Transit Co.*, 134 Mich. 591, 96 N. W. 925, the court adhered to its original decision. "Any other rule," said Mr. Justice Montgomery, "would result in unseemly contests between the passenger and the conductor, and would put upon the conductor the burden of determining at his peril, by facts not evidenced by the ticket produced, whether the passenger was entitled to ride. This determination was reaffirmed in *Mahoney v. Railway Co.*, 93 Mich. 612, 53 N. W. 793, 18 L. R. A. 335, 32 Am. St. Rep. 528, and *Heffron v. Railway Co.*, 92 Mich. 406, 52 N. W. 802, 16 L. R. A. 345, 31 Am. St. Rep. 601, in an opinion by Mr. Justice Morse, where the case of *Hufford v. Railway Co.*, 64 Mich. 631, 31 N. W. 544, 8 Am. St. Rep. 859, is distinguished on the ground that in the *Hufford Case* the ticket was one purporting on its face to cover the distance to be traveled by *Hufford*. This case was again distinguished in the case of

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Van Dusan v. Railway Co., 97 Mich. 439, 56 N. W. 848, 37 Am. St. Rep. 354, and upon the same identical ground. The rule of law cannot be said to be in doubt in Michigan."

In *Monnier v. Railway Co.*, 175 N. Y. 281, 67 N. E. 569, 62 L. R. A. 357, 96 Am. St. Rep. 619, it was held that a passenger who was unable to purchase a railway ticket before entering a train because of the absence of the ticket agent should pay the extra fare required of a passenger who pays cash on the train instead of presenting a ticket, and that upon his refusal to do so he may be ejected from the train and relegated to an action for damages against the company, based on the negligence of the ticket agent. But Judge Cullen, agreeing on this point with the dissent of Judge Bartlett said: "Each party was bound to know and determine for itself its legal right, and also that if the plaintiff was within his legal rights he was justified in resisting an attempt to remove him from the car." In view of these decisions of the Court of Appeals, the other New York cases are useful merely as history or illustrations. In *Parish v. Ulster Railway Company*, 99 App. Div. 10, 90 N. Y. Supp. 1000, it was held that, unless the ticket on its face authorized the person presenting it to ride upon the train, the conductor was justified in ejecting him. In *Hanley v. Brooklyn Heights Ry. Co.*, 110 App. Div. 429, 96 N. Y. Supp. 249, it appeared that the passenger walked the distance of a block along the car line from the place where the transfer by its terms was "good only," and it was held error to submit to the jury the question whether she had substantially violated the reasonable rules of the company. For a similar case, see *Percy v. Street Ry. Co.*, 58 Mo. App. 75. In *Townsend v. Railway Co.*, 56 N. Y. 295, 15 Am. Rep. 419, it appeared that the plaintiff purchased a ticket from Sing Sing to Rinebeck. At Poughkeepsie he left the car and waited for the next train. He had surrendered his ticket to the conductor on the first train without obtaining any evidence of his right to stop over. He explained the matter to the conductor on the second train, and upon his refusal to pay another fare was ejected from the car. It was held that he could not recover. "I am unable to see," said Mr. Justice Grover, "how the wrongful act of the previous conductor can at all justify the passenger in violating the lawful regulations upon another train." In *Nicholson v. Brooklyn Heights Ry. Co.*, 118 App. Div. 13, 103 N. Y. Supp. 310, following the *Monnier Case*, it was held that a passenger who knows that his transfer has expired cannot recover damages for being ejected from the car, although the first conductor informed him that the transfer would be accepted.

In *Norton v. Consolidated Railway Co.*, 79 Conn. 109, 63 Atl. 1087, it was held that the transfer slip is the only evidence of the passenger's right which the conductor can properly accept.

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In *McGhee v. Reynolds*, 117 Ala. 413, 23 South. 68, it was held that a conductor has the absolute right to rely upon the language of the ticket, which is the sole and exclusive evidence of the passenger's rights, and, if it is void on its face, the passenger who refuses to pay another fare may properly be ejected from the car. See, also, *Kansas City, etc., Ry. Co. v. Foster*, 134 Ala. 244, 32 South. 773, 92 Am. St. Rep. 25. But in *Montgomery Traction Co. v. Fitzpatrick* (Ala.) 43 South. 136, 9 L. R. A. (N. S.) 851, it was held that an action in tort would lie against the street car company for the negligence of the conductor in so tearing the transfer slip that it could not be used on the next car, which resulted in the ejection of the passenger.

In *Kiley v. Chicago City Ry. Co.*, 189 Ill. 384, 59 N. E. 794, 52 L. R. A. 626, 82 Am. St. Rep. 460, and in several earlier decisions of the same court, it is held that, when a transfer is refused by the conductor, the passenger must either pay his fare or leave the car, and if he fails to do so he may be ejected, without liability on the part of the company in tort for damages.

In *Woods v. Metropolitan Street Railway Company*, 48 Mo. App. 125, the rule of the company required the conductor to collect "proper tickets or transfers." A passenger who presented a transfer which had been torn in two pieces was ejected from the car because of the impropriety of the transfer, and it was held that he could not maintain an action for damages resulting from the expulsion. There was some evidence tending to show that persons sometimes picked up torn transfers from the ground where they had been thrown by passengers, and a suspicion of the conductor that this had been done by the person who presented this slip was held to justify the conductor in demanding the payment of another fare. The right of the passenger was no thought of much importance, as compared with the fact that for conductor to investigate his claim would produce confusion, delay, and dispute incompatible with the business of a common carrier and subversive of the comfort of the general traveling public.

In Texas the right of the company to eject a passenger because the transfer slip which he presented was folded was denied, even though the passenger refused to unfold it at the request of the conductor. *El Paso Electric Railway Co. v. Alderete*, 36 Tex. Civ. App. 142, 81 S. W. 1246.

Western Maryland Ry. Co. v. Schaun, 97 Md. 563, 55 Atl. 701, illustrates the palpable injustice which may result from the rule which makes the ticket the conclusive evidence of the passenger's rights. The plaintiff purchased at A. an excursion ticket to B., by the terms of which the conductor on the going trip, in exchange for the original ticket, was required to issue a return ticket so punched as to describe the personal appearance of the

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passenger, by whom alone it might be used. The conductor took the plaintiff's ticket, and gave her a return ticket, which he punished so as to describe her as, "light, slight, and young." She was in fact dark, stout, and middle-aged. She placed the return ticket in her pocket without looking at it, and on the return trip presented it to the same conductor, who refused to accept it because she did not answer to the description which he had given of her earlier in the day. She refused to pay another fare and was ejected from the car. There was evidence tending to show that the conductor was acquainted with the passenger; but it was not thought sufficient to carry the issue to the jury. It was conceded that the conduct of the conductor would have been unjustifiable, had he known that the passenger was in fact entitled to ride on the train. The knowledge of the conductor of the actual facts would seem to be of no consequence, if the ticket is the sole and conclusive evidence of the rights of the passenger, as had been held in the earlier case of *W. M. Ry. Co v. Stockdale*, 83 Md. 245, 34 Atl. 880. *Garrison v. United Railroad, etc., Co.*, 97 Md. 347, 55 Atl. 371, 99 Am. St. Rep. 452, also well illustrates the sacrifice of individual rights which results from regarding the rules and regulations of the carrier as all-important. The statute required a street railway company to issue transfers "upon the payment of each cash fare, which transfer shall be good at all points of intersection of lines of said railway for a continuous ride." It was held that under this statute the company might properly limit the time within which the transfers might be used, and that it was not required to accept the transfer after the expiration of the time designated by the punch on the slip, although the company did not run its cars frequently enough to permit the use of the transfer within such time. But see *Jenkins v. Brooklyn Ry. Co.*, 29 App. Div. 8, 51 N. Y. Supp. 216; *Hanna v. Nassau Elec. Ry. Co.*, 18 App. Div. 137, 45 N. Y. Supp. 437; *McMahon v. Third Ave. Ry. Co.*, 47 N. Y. Super. Ct. 282.

In *Perine v. North Jersey St. Ry. Co.*, 69 N. J. Law, 230, 54 Atl. 799, the ticket had been erroneously punched, and it was held that an action for the expulsion of the passenger would lie, unless the passenger by his own carelessness had contributed to the production of the situation. This makes each case turn upon the question of fact. In *Shelton v. Erie Ry. Co.* (N. J. Err. & App.) 66 Atl. 403, 9 L. R. A. (N. S.) 727, it was held that a railway ticket, in so far as it speaks at all, is conclusive as to the rights of the passenger by whom it is presented. See *Hayter v. Brunswick Traction Co.*, 66 N. J. Law, 575, 49 Atl. 714.

In *Rolfs v. Railway Co.*, 66 Kan. 272, 71 Pac. 526, where a passenger presented a mileage book which by its terms had expired, the court said that the conductor could not be required to

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hear, weigh, and verify his story in opposition to the language of the ticket.

In *Little Rock, etc., Co. v. Goerner*, 80 Ark. 158, 95 S. W. 1007, 7 L. R. A. (N. S.) 97, it is held that a passenger who is ejected from a street car on presenting an invalid transfer check, given him by a former conductor, and refusing to pay another fare, is restricted to an action for damages for a breach of the contract.

In *Peabody v. Oregon Ry. & Nav. Co.*, 21 Ore. 121, 26 Pac. 1053, 12 L. R. A. 823, it appeared that the plaintiff paid his fare to a designated station to the conductor, who gave him a draw-back check on the face of which appeared the words, "Good for this day and train only." At the time of paying his fare, and before receiving the check, he asked the conductor if he might stop off at a certain station, and was informed that he might do so. The conductor of the next train refused to accept the check, and it was held that it was the duty of the passenger to pay his fare or quietly leave the train when requested to do so, and resort to his appropriate remedy for the damages he had sustained.

In *McKay v. Railway Company*, 34 W. Va. 65, 11 S. E. 737, 9 L. R. A. 132, 26 Am. St. Rep. 913, it was held that if a passenger pays a railway agent fare for a certain trip, and by the mistake of the agent is given a ticket which does not answer for that trip, but for one in the opposite direction, and the conductor refuses to recognize the ticket and demands fare, which the passenger fails to pay, the ejection of the passenger from the train without unnecessary force is not a ground for action against the company. But see *Trice v. Chesapeake, etc., Ry. Co.*, 40 W. Va. 271, 21 S. E. 1022.

In *Railway Company v. Hill*, 105 Va. 729, 54 S. E. 872, 6 L. R. A. (N. S.) 899, a party who called for a ticket to A. was by a mistake of the agent given a ticket to B., an intermediate station. He neglected to examine the ticket, and after passing B. was ejected from the car. It was held that the action of the conductor was not wrongful, and that no action in tort could be maintained, unless undue force or violence were used.

In *Yorton v. Railway Company*, 54 Wis. 234, 11 N. W. 482, 41 Am. Rep. 23, a party bought a ticket for A., and while on the train asked the conductor for a stop-over at B. Instead of giving him a proper ticket, the conductor gave him an ordinary train check, which the conductor of the next train refused to accept. The court said that the conductor "was perfectly justifiable in ejecting the plaintiff from his train, when the plaintiff had no proper voucher, produced no sufficient evidence of his right to ride thereon, and refused to pay a fare, and he himself was ignorant of the transaction between the passenger and the former conductor."

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In *Poulin v. Canadian Pacific Railway Company*, 52 Fed. 197, 3 C. C. A. 23, 17 L. R. A. 800, it is held that the face of the ticket is conclusive evidence to the conductor of the terms of the contract of carriage between the passenger and the company, and that the reason for the rule is found in the impossibility of operating railways on any other principle, with due regard to the convenience of the rest of the traveling public or the proper security of the company in collecting its fares.

2. It will thus be seen that in a number of jurisdictions the decisions sustain the appellant's position and would require a reversal of the order of the trial court. As between the carrier and the passenger, the reasons assigned by these decisions seem to us entirely inadequate and unconvincing. There is, however, some force in the claim that the interests of the general traveling public require the subordination of the strict rights of the passenger, in order to avoid unseemly controversies and possible breaches of the peace. But we are not in sympathy with any rule which necessarily requires the individual to submit to imposition and abandon his legal rights, unless there is some almost overwhelming necessity therefor in public policy. The recognition of the right to maintain an action in tort for damages resulting from the wrongful expulsion of a passenger from a car does not imply a right in the passenger to forcibly resist the effort to expel him. That is a matter which relates to another phase of the question, to be considered hereafter. It is apparent that the tendency at present is towards the recognition of the right to sue in tort. As said by a recent writer: "The weight of authority in the courts, state and national, however, is to the effect that the passenger has a right to rely upon the acts and statements of the ticket agents or conductors, and that if expelled from the train, and he has acted in good faith and is without fault, the carrier will be liable in damages for such expulsion, whether the action is brought for the breach of the contract or solely for the tort of the conductor." Moore, Carriers, p. 743. To the same effect, see 6 Cyc. 557; note to 4 Street Ry. Rep. p. 234; 3 Wood, Railways, § 349. Contra: 4 Elliott, Railroads (4th Ed.) §§ 1594, 1602.

The following cases illustrate the application of this general rule and state the reasons upon which it rests: In *New York, Lake Erie & W. Railway Co v. Winter's Adm'r*, 143 U. S. 60, 12 Sup. Ct. 356, 36 L. Ed. 71, it appeared that the plaintiff purchased a ticket to A., and at the time informed the agent that he wished to stop over at an intermediate station. The ticket agent instructed him to speak to the conductor about the matter. Before reaching the station where he desired to stop, the passenger informed the conductor that he wished to stop over; and the conductor, instead of giving him proper evidence of his right,

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merely punched his ticket and returned it to him, with the statement that the conductor on the next train would accept it. The punched ticket was tendered on the next train, with a statement of what had occurred; but the conductor refused to accept it, and upon declining to pay another fare the passenger was required to leave the train. In an action to recover damages it was held that the passenger was rightfully on the train, and that the company was liable in tort for damages resulting from the act of the conductor in ejecting him. "If he was rightfully on the train as a passenger," said Mr. Justice Lamar, "he had the right to refuse to be ejected from it, and to make a sufficient resistance to being put off to denote that he was being removed by compulsion and against his will; and the fact that under the circumstances he was put off the train was of itself a good cause of action against the company, irrespective of any physical injury he may have received at the time or which was caused thereby." See 12 Rose's Notes on U. S. Reports, p. 110. The claim that the ticket is the only evidence of the passenger's right to ride was carefully considered in *Burnham v. Grand Trunk Ry. Co.*, 63 Me. 298, 18 Am. Rep. 220. The plaintiff purchased a ticket to N., which bore the indorsement, "Good for this day only." In the absence of any other evidence, this would have been proof of a contract for transportation on a train which went through on that day. But the plaintiff proved a different contract made with the ticket agent at the time of the purchase of the ticket. In accordance with this oral contract he stopped over at an intermediate station and took a train the next day, from which he was ejected because of the recital on the face of the ticket. He recovered damages for the wrongful act of the conductor in an action for damages. In reference to the claim that the ticket is the only admissible evidence in the contract the court said: "But it is seldom, if ever, that the ticket embodies all the elements of the contract. The running of the trains, as well as all reasonable rules prescribing the manner and facilitating the business of carrying passengers, certainly so far as known, becomes a part of the contract and may be proved by either party, although not indorsed upon the ticket. *Sears v. Eastern Ry. Co.* 14 Allen (Mass.) 433, 92 Am. Dec. 780. In the case at bar the inquiry presented is: What is the contract? Not whether the rule of the company, or the contract expressed by the ticket, is reasonable. No objection is made to the authority of the company to make such a rule or contract. But did the plaintiff have such a knowledge of the rule as to make it binding upon him, or did he in any way assent to it as a part of the contract for his passage from South Paris to Northumberland? As either party may prove the terms of the contract not expressed upon the ticket, so either party may prove the acceptance or rejection of any

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terms indorsed thereon. The ticket is not a written contract signed by the parties. It is at most evidence of some existing contract for a passage between two places named and that the holder has paid the fare demanded. * * * The real contract between the plaintiff and the ticket agent was made before the ticket was seen. The plaintiff paid his money upon the statement of the agent, and not upon any indorsement upon the ticket. He took the ticket, not as expressing a contract, but as proof of the contract he had already made with the agent. He had neither seen nor assented to the indorsement, nor was he asked to assent to it. As between the plaintiff and the agent, the contract was definite, with no misunderstanding or suggestion of it." It was therefore held that the representations by the agent could be shown, and that after being informed of the facts the conductor had no right to eject the passenger.

The notion that the carrier can substantially relieve himself from responsibility for the wrongful act of one of its agents by asserting the duty of another of its agents to enforce a reasonable rule for the conduct of its general business was repudiated in *Sloane v. So. Pac. Ry. Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193. It there appeared that the plaintiff purchased a ticket from North Pomona to San Diego. Before reaching San Bernadino, where it was necessary to change cars, the conductor took up the ticket without giving the passenger any evidence of her right to continue the trip on the other train. The next conductor ejected her, because she had no ticket, and it was held that she might recover damages therefor. "If the conductor who took up the ticket," said the court, "had himself, at a subsequent point in the trip, excluded her for failure to exhibit it, the liability of the defendant would not be questioned. Its liability is the same, notwithstanding for its own convenience it has intrusted the management of its trains to different conductors. *Muckle v. Rochester Ry. Co.*, 79 Hun, 32, 29 N. Y. Supp. 732. The plaintiff was not called upon to question the right of the first conductor to take up her ticket, and it was the duty of the defendant to see that she was not thereby deprived of her right to passage upon its cars." In *Head v. Ga., etc., Ry. Co.*, 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434, it was held that if the purchaser of a round-trip ticket, after paying for and receiving it, performs all the stipulations of the contract on his part, or offers to do so, the company is bound to recognize and honor the ticket when and whenever duly presented, notwithstanding any omission of its agent in signing or stamping the same. In *Hornesby v. Ga. Ry. Co.*, 120 Ga. 913, 48 S. E. 339, it was held that a person who fails to comply with the rule which requires a passenger to present a valid transfer check may recover damages for being ejected from the car, upon proving that his failure to have a valid check

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was due to a fault of an employee of the company who had authority to act for it in such matters. So in *Louisville, etc., Ry. Co. v. Gaines*, 99 Ky. 411, 36 S. W. 174, 59 Am. St. Rep. 465, it was held that, while the conductor had the right to rely upon the ticket—that is, as between himself and his employer—the carrier was nevertheless liable in ejecting a passenger who had been given a ticket other than that for which he had asked and paid. “The right to bring such action,” said the court, “is evident. If the fault was that of the agent of the company, the remedy by an action for tort, where the passenger is forcibly ejected, ought not to be questioned.” In *Hot Springs Ry. Co. v. Deloney*, 65 Ark. 177, 45 S. W. 351, 67 Am. St. Rep. 913, the right of a passenger who has been given a wrong ticket by an agent of the carrier to recover damages for being ejected from the car is sustained. But see *Little Rock, etc., Co. v. Goerner*, 80 Ark. 158, 95 S. W. 1007, 7 L. R. A. (N. S.) 97. In Pennsylvania a passenger who in good faith presented a return slip wrongfully given him by the conductor was allowed to recover damages for his exclusion from the car. See, also, *Little Rock Traction Co. v. Winn*, 75 Ark. 529, 87 S. W. 1025; *Balt. & O. Ry. Co. v. Bambrey* (Pa.) 16 Atl. 67. The same conclusion was reached in *Laird v. Pittsburg Traction Co.*, 166 Pa. 4, 31 Atl. 51, where a passenger on a street car made a timely request for a transfer, but which was not given him until he was about to leave the car. On the margin of the transfer slip the hour of 9 a. m. was punched. This was correct; but the conductor also punched the hour of 7:30 a. m., and the second conductor refused to accept the transfer and ejected the passenger, after he had stated the facts and refused to pay another fare. See, also, *Eddy v. Syracuse Ry. Co.*, 50 App. Div. 109, 63 N. Y. Supp. 645.

There is ample authority for the rule that the burden of inspecting the transfer slip and seeing that the conductor has properly punched it cannot be thrown upon the passenger. In *Gulf, etc., Ry. Co. v. Copeland*, 17 Tex. Civ. App. 55, 42 S. W. 239, it is held that a passenger may, in the absence of notice to the contrary, assume that the carrier has furnished him with a ticket which states the terms of the contract correctly, and he is not bound to inspect it and see that the agent has performed his duty. “This court,” said Chief Justice Fisher, “has heretofore in several cases (notably *Railway Co. v. Rather*, 3 Tex. Civ. App. 72, 21 S. W. 951, and *Railway Co. v. Halbrook*, 12 Tex. Civ. App. 475, 33 S. W. 1029) affirmed the doctrine that the ticket or pass does not in all instances furnish the exclusive right of the passenger to transportation, and that under certain circumstances the contract as actually entered into between the passenger and the agent of the carrier may be looked to in order to ascertain the rights of a passenger.” In *O'Rourke v. Citi-*

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zens' St. Ry. Co., 103 Tenn. 124, 52 S. W. 872, 46 L. R. A. 614, 76 Am. St. Rep. 639, it appeared that the first conductor punched the passenger's ticket erroneously, so that it appeared that the time limit had expired. It was held that the face of the ticket was not the sole criterion of the passenger's right to ride, and that a condition in a transfer slip that the passenger agrees to pay the regular fare charged if there is a controversy with the conductor about the check, and then apply to the office of the company for the return of his money, is void for unreasonableness, as is also a condition printed on the slip that the passenger will examine time, date, and direction, and see that they are correct. In *Memphis Street Ry. Co. v. Graves*, 110 Tenn. 232, 75 S. W. 729, 100 Am. St. Rep. 803, the court said: "The tickets or tokens are prepared by the company. They contain more or less of printed and other directions. Some passengers cannot read; others are children. None of them have the time or opportunity in the rush of travel to scrutinize the ticket, and in many instances, if they could, they could not understand the devices used by the company. The passenger has the right to assume that the conductor has given him the proper ticket, and if he makes a mistake it is the fault of the company, for which it is liable; and if the passenger in good faith accepts the ticket he is not bound to stop and scrutinize it and see that no mistake has been made."

The same general conclusion was reached in the well-considered case of *Indianapolis Street Ry. Co. v. Wilson*, 161 Ind. 153, 66 N. E. 950, 67 N. E. 993, 100 Am. St. Rep. 261. The plaintiff took passage on one of the defendant's street cars, paid his fare, and requested the conductor to give him a transfer ticket to a certain other line. The conductor gave him a ticket, and upon arriving at the transfer station the passenger boarded a car of the line to which he had asked to be transferred. The conductor of the car refused to accept the ticket, because it called for a transfer to another line of the defendant's road. Regardless of explanations, the passenger was ejected from the car and recovered damages therefor in an action in tort. "The duty of inspection, under the circumstances," said the court, "the law did not exact of him; for, in the absence of any notice to the contrary, he had the right to presume that appellant's conductor and agent had correctly discharged his duty in punching the ticket and thereby indicating the transfer over the line in accordance with his request. Appellee had nothing to do with the preparation of the ticket; for appellant seems to have prescribed the form and contents thereof, and also the method or means to be employed to indicate or point out thereon the line of its railroad over which a transferee was entitled to be carried. The many words, figures, faces, and abbreviations which the ticket fur-

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nished by appellant to appellee, as exhibited by the record, contained, would prima facie be unintelligible to many persons, and certainly it would be an unreasonable imposition to require of a passenger, upon receiving one of these tickets, the duty to inspect the same in order to discover if the conductor had made a mistake in the performance of his duty. Appellee, a mere passenger, under the circumstances was not, in the eye of the law, either presumed or bound to know the meaning of the various figures, abbreviations, punch marks, and other mystic symbols which the transfer ticket in question contained. These possibly could only be correctly interpreted or read in the light of the rules and regulations adopted by appellant company for the guidance of its conductors and employees. Neither was he presumed to know or required to take notice of these rules and regulations made by appellant for the aforesaid purpose."

The Supreme Court of Ohio, in *Cleveland City Ry. Co. v. Conner*, 74 Ohio St. 225, 78 N. E. 376, recognizes the right of a passenger to recover damages in an action in tort for wrongful ejection, but imposes upon him the duty of exercising ordinary care in receiving and making use of the transfer slip. In considering the grounds upon which the right of action rests, the court said: "This is not a controversy between the master and the servant, nor between the passenger and the conductor, nor yet between the carrier and the passenger solely in regard to the act of the carrier's servants in ejecting the passenger from the car; but it is an action against the carrier for the wrongful and negligent act of giving the transfer as the proximate cause of the resulting injury, which was the refusal to carry the plaintiff as he had a right to be carried and putting him off the car. Since the complaint is against the company itself, it can avail the defendant nothing to show that one of its servants obeyed a reasonable rule of the defendant in putting the plaintiff off the defendant's car, when the defendant itself through the agency of another servant created the conditions which caused him to be put off. * * * It is as though a single individual at first agreed to carry the plaintiff by the St. Clair Street line, and by mistake had given a ticket over the Woodland Avenue line, and then, when he came to take up the ticket, taking advantage of his own mistake or wrong, refused to honor it and forcibly ejected the plaintiff. The defendant * * * is the actor throughout this transaction, although it acted through different agencies, in giving and refusing to accept the transfer and ejecting the plaintiff. It is, therefore, not sound reasoning to argue that the company is not liable in tort for refusal to carry the plaintiff and ejecting him from the car upon the theory that the conductor who removed the passenger from the car under a rule of the company is personally without blame in the matter." See,

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also, Ga., etc., Ry. Co. *v. Baker*, 125 Ga. 562, 54 S. E. 639, 7 L. R. A. (N. S.) 103, 114 Am. St. Rep. 246; *Lawshe v. Tacoma*, etc., Ry. Co., 29 Wash. 681, 70 Pac. 118, 59 L. R. A. 350; *Moon v. Interurban*, etc., Co. (Sup.) 85 N. Y. Supp. 363; *Eddy v. Syracuse*, etc., Ry. Co., 50 App. Div. 109, 63 N. Y. Supp. 645; *Jacobs v. Third Ave. Ry. Co.*, 71 App. Div. 199, 75 N. Y. Supp. 679; *Baggett v. Railway Co.*, 3 App. D. C. 522; *Ellsworth v. Railway Co.*, 95 Iowa, 98, 63 N. W. 584, 29 L. R. A. 173; *Carpenter v. Railway Co.*, 3 Mackey (D. C.) 225; *Kansas City*, etc., Ry. Co. *v. Riley*, 68 Miss. 765, 9 South. 443, 13 L. R. A. 38, 24 Am. St. Rep. 307.

3. Certain phases of the general question have already been determined by this court. In *Pine v. St. Paul City Ry. Co.*, 50 Minn. 144, 52 N. W. 392, 16 L. R. A. 347, the manifestly proper rule was recognized that, if a passenger accepts a transfer plainly marked for a particular line, he is not entitled to take a car upon another line. The case involved no question of mistake or misconduct of an agent of the company by which the passenger was misled. He asked for a transfer over a certain line, and was given one which, although general in its terms, entitled the passenger to ride upon the car on which he attempted to use it. His expulsion was therefore wrongful, and he recovered damages in an action in tort. In *Appleby v. St. Paul Street Ry. Co.*, 54 Minn. 169, 55 N. W. 1117, 40 Am. St. Rep. 308, a passenger paid his fare and received a transfer check which entitled him to continue his journey by the next connecting car on another line. He took the proper car after being transferred, and the conductor took up his transfer check. After the car had gone a short distance it was taken off. The conductor disappeared; but the driver of the car told the passengers to take the next car, which was then approaching on the same line. But the conductor on that car, although informed of the facts by the plaintiff, demanded another fare, and, this being refused, the passenger was ejected. In an action for damages for the expulsion, it was held that on the whole case the plaintiff was entitled to recover. He had done all that was required of him. It was the duty of the company under the circumstances to give the passenger such directions in reference to its system or course of conduct as was reasonably necessary to enable him to pursue his journey. When it became apparent that the car was being taken off without previous notice, the passenger had a right to expect information of some one as to how he was to proceed on his journey. Upon being informed that he was to take the next car he was justified in acting upon that information. The case was distinguished from one where a person enters a car knowing that he is without evidence of his right of passage as required by the reasonable regulations of the carrier. The right of action did not rest upon

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the bare fact of expulsion by the conductor, but upon the conduct or neglect of the carrier which resulted in and included the expulsion. The cause of action set forth in the complaint covered the whole transaction, and it was held that upon such facts the company had neglected its duty towards the passenger to his injury, and he could recover damages in an action in tort. The court said: "Even though the conductor, in ejecting the plaintiff, may have done only what was apparently (to him) his duty towards the passenger, it had justified him in assuming to continue his journey on a car from which the conductor, in accordance with the regulations of the defendant, should expel him for nonpayment of fare, * * * and under the circumstances the jury might reasonably have found that the defendant's conduct, through its agents, had justified the plaintiff in taking the car."

Kreuger v. Chicago, etc., Ry. Co., 68 Minn. 445, 71 N. W. 683, 64 Am. St. Rep. 487, is relied upon by appellant as committing the court to the doctrine for which it contends. This reliance is possibly justified by statements made in the opinion, but not by the decision itself. The plaintiff there purchased a railway mileage book containing 2,000 miles of transportation. The date of the issue of the book was stamped somewhat illegibly thereon, and by mistake of the agent the book was punched so as to show that it expired on the day that it was issued, instead of one year later, as was intended by both parties. The purchaser signed a contract, which was printed on the cover of the book, which stated that the ticket was "void for passage after date punched in the margin." The conductor to whom the ticket was presented refused to accept it, and upon the refusal of the passenger to pay fare he was ejected from the train. In an action for damages for the wrong, he recovered a verdict, which was sustained on appeal. In answer to the contention that, where a passenger presents a ticket not apparently valid on its face, it is the duty of the conductor to refuse to accept it, and to eject the passenger from the train if he refuses to pay a fare, and that the passenger is bound to know that the rules of the company require such action on the part of the conductor and to abide thereby, the court said: "So far as it goes, the rule is correctly stated in a note to *Commonwealth v. Power*, 7 Metc. (Mass.) 596, 41 Am. Dec. 465, but that, so far as this rule refuses to the passenger damages for being forcibly ejected, it does not apply when, from the circumstances appearing on the face of the ticket and the surrounding circumstances known to the conductor, it is probable that a mistake has been made by the company in issuing the ticket, and this probability is so strong that the conductors should, under the circumstances, investigate further before ejecting the passenger. The statements of the

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passenger need not be accepted in such case, except so far as they call the conductor's attention to facts and circumstances which he can then and there observe." There was conflicting evidence as to whether the date of the issue of the ticket was legible, and it was said that, if there was nothing on the face of the ticket to put the conductor on inquiry, he was justified in ejecting the passenger. This was a statement of that which would defeat a recovery. What was said in support of the theory upon which the conclusion rests is dicta, and, in so far as it is inconsistent with what is here held, does not meet with our approval. The case sustained the right of a passenger, who was ejected from the car because his ticket did not on its face entitle him to ride, to maintain an action in tort for damages when the circumstances were such that the conductor should as a reasonable man have paid some attention to his claim that the defect in the ticket was the result of a mistake on the part of another agent of the carrier. The decision is inconsistent with the doctrine that the ticket is the sole and conclusive evidence of the passenger's right to ride, as it recognizes the duty of the conductor to consider extraneous facts and circumstances, and requires him to reach the proper conclusion thereon upon the peril of rendering the carrier responsible for the damages resulting from the expulsion of the passenger, who is entitled, under his actual contract with the carrier, to ride on the car. The decision is also adverse to the rule which casts upon the passenger the burden of inspecting the ticket in order to see whether it is in proper form.

4. The result of an examination of the authorities and consideration of the reasons upon which they rest has convinced us that public policy, as well as the necessity for protecting the rights of individuals, requires us to hold that a transfer slip is not the sole and exclusive evidence of the right of the holder to ride on the street car, and that the law does not impose upon the passenger the absolute duty to examine the slip when it is received and see that it is correct. The contract between the carrier and the passenger is complete when the passenger pays his fare. He is then entitled to be carried to the end of the line of cars to which the city ordinance entitles him to be transferred. His rights as a passenger are measured by the statutes, ordinances, and decisions of the courts; that is, by the law, and not by any written contract which exists between him and the carrier. When he reaches the place where he desires, and is entitled, to be transferred to another car, it is the duty of the carrier to furnish him with proper evidence, for presentation to the conductor of the next car, of his right to ride. The ordinance of the city of Minneapolis, approved April 11, 1892, provides that the "street railway company shall issue transfer checks at the junction of its

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street railway lines in said city at Washington and Hennepin avenues, in said city, to any passenger on any of said lines who shall pay one full fare, which transfer check shall (subject to certain provisions not here material) entitle the passenger so receiving the same to a continuous passage on either of said connecting lines." By section 2 of the ordinance it is provided that the company shall forfeit to the city the sum of \$50 for each time it refuses so to issue a transfer check and for each time it refuses to honor the same by carrying any passenger so entitled thereto on any connecting lines. The ordinance thus makes it the duty of the street railway company to furnish a proper transfer, and this duty cannot be shifted by it to the passenger by any rule or principle which requires the passenger to see that the transfer is properly made out. The check is nothing more than a token, which the passenger is instructed by the carrier to take to the next conductor. It is not a contract between the company and the passenger, by which the company is bound to carry the passenger the remainder of his journey, subject to conditions printed thereon. The contract is made when the fare is paid. It is then complete. The ordinance determines the right of the passenger to the transfer, and prescribes when and where it must be issued and used. Nothing printed on the transfer check which is contrary to the provisions of the ordinance can have any force and effect.

In the present instance the plaintiff claimed that she received a check from the conductor of the Interurban line as she was leaving the car at the intersection of Washington and Hennepin avenues. The company claimed that the transfer check which she presented on the Eighth & Chicago car had not been issued by a conductor on an Interurban car, because it was different in color and printed matter from the checks used on that line; but the jury found that the plaintiff had received the check which she actually presented from the conductor of the Interurban car. Assuming this to be true, as we must for the purposes of this case, it is evident that the first conductor made a mistake and gave her the wrong check. The original check, unfortunately, was not preserved. The plaintiff testified that it was destroyed by the conductor. In view of the character of the transfer slip, it would be unreasonable to impose upon the passenger the duty of checking up the work of the conductor. A glance at the sample slip introduced in evidence, and inserted herein, suggests that such examination, by many who ride upon the street cars, would be utterly useless. It is admirably adapted to the use of the carrier and its agents. The various colors, fine print, and tabulated figures render it confusing and unintelligible to many persons. The significance of the figures is not explained. It is left to inference. There is no explanatory printed matter at the head of

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the columns of figures. That the figures refer to time is left to inference. Persons who use the transfers daily doubtless understand them, but such understanding is more the result of experience than information acquired from the slip. It is given to all kinds of travelers—the old and the young, the educated and the ignorant, the blind, and the visitor, to whom transfers are sometimes a novelty. A person trained in the study of statistical tables and tabulated data can, of course, ascertain within a reasonable time whether the slip entitles him to ride on the desired car; but an ordinary person of fair intelligence, good eyes, and a reasonable amount of patience requires more leisure for the purpose than is available during the hurried emptying of an overcrowded car, with a conductor standing on the rear platform and passing out the slips to all comers. It is the duty of the conductor, not of the passenger, to see that a proper transfer slip is issued.

The wrong which resulted in the expulsion of the plaintiff from the car was that of an agent and representative of the carrier. The obligation imposed upon the carrier cannot be avoided by the division of labor and duties between the different agents of the carrier. There is unity of obligation, and the act of each conductor is the act of the corporation, from whom the duty is owing to the passenger. When there is a breach of that duty on the part of one agent, which results in a wrong to a passenger by another agent, of the company, the company is liable for the results, although the latter agent may have been acting in good faith, under instructions received from his employer. The fear expressed in many of the decisions that such a rule will subject the carrier to imposition has very little foundation. There can be no recovery of damages in any case unless the passenger is able to prove that he was entitled to a good transfer and was deprived of it by the negligent act of the first conductor. The rule which we adopt has been in force in many states for years, and we are yet to learn that any serious prejudice has resulted therefrom to carriers of passengers.

5. It does not follow that, because the carrier has not the legal right to eject the passenger, the passenger has the right to use force to prevent himself from being ejected. Many of the decisions which deny to the wronged passenger a right of action for the expulsion rest upon the assumed necessity of subordinating the rights of the individual to those of the general traveling public, on the assumption that a contrary rule would result in unseemly physical encounters and breaches of the peace. But this does not necessarily follow. When a passenger is wrongfully ordered to leave the car, his right of action is complete. He must go quietly, and not await the application of actual force. The constructive force involved in the order of the representative of the carrier under circumstances which show an intention to en-

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force the order is all that is required. His cause of action is then complete, and if he engages in any contest of force with the conductor he does so at his own peril, and can recover no damages for injuries received or humiliation suffered by reason of his insistence upon the use of actual force. The damages which he is entitled to recover for the wrongful expulsion are such only as result from being required to leave the car, and cannot be enhanced by his own conduct, which results in an assault, with its resulting injuries and humiliation. This is but the application of the well-established rule that it is the duty of a person who finds that he has been wronged to use all reasonable means to arrest the loss. *Gniadck v. M. W., etc., Co.*, 73 Minn. 87, 75 N. W. 894; 1 Joyce, Damages, § 194; 13 Cyc. 71; 1 Sedgwick, Damages, §§ 201, 202.

It is not claimed that the damages awarded in this case are excessive, and there is no assignment of error based upon any instructions with reference to the measure of damages. Under the rule which requires the passenger to leave the car upon demand without resistance, it is probable that the plaintiff would not have recovered so large a verdict; but as it is not greatly, if at all, in excess of what the jury would have been entitled to award, we will not interfere with it.

The order of the trial court is affirmed.

ILLINOIS CENT. R. CO. v. GORTIKOV.

(Supreme Court of Mississippi, Jan. 27, 1908.)

[45 So. Rep. 363.]

Carriers—Passengers—Ejection—Ticket.—Where plaintiff's ticket described him, even to the fact of his having a mustache, defendant's conductor was not entitled to eject him without giving plaintiff an opportunity to further identify himself as the original purchaser of the ticket, because the selling agent by mistake punched the ticket for a female, instead of a male; the passenger not being required to verify the punch marks of the selling agent.

Same—Return Limit.—Where a return ticket, bought October 27th, provided that it was good for 90 days from its date, to be not later than December 31, 1904, it did not expire until such date, though the return limit was punched for December 14th.

Same—Ejection—Punitive Damages.*—Where plaintiff, the original

*For the authorities in this series on the subject of the right to recover punitive or exemplary damages for wrongs to passengers, see foot-note appended to *Chiles v. Southern Ry.* (S. Car.), 12 R. R. R. 750, 35 Am. & Eng. R. Cas., N. S., 750, where all those preceding it are collected or referred to; foot-notes appended to *Atlanta & W. P. R. Co. v. Potts* (Ga.), 24 R. R. R. 621, 47 Am. & Eng. R. Cas., N. S., 621.

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purchaser of a return railroad ticket, was ejected by the conductor because the selling agent had erroneously punched the ticket for a female, instead of a male, and the conductor said that it was a "bogus ticket," and ejected plaintiff without giving him an opportunity for an explanation, such facts warranted a recovery of both actual and exemplary damages.

Same—Contract—Cautionary Provisions.—A provision on a railroad ticket, printed under the head "Caution," that in cases of doubt between the passenger and conductor the passenger should pay the rate which the conductor demanded, take his receipt, and report to the general office, and then the same would "receive prompt attention," was mere advice, and not a part of the ticket.

Same—Reasonableness—Validity.—Such provision, if regarded as a part of the contract, would be unreasonable and void.

Appeal from Circuit Court, Grenada County; J. T. Dunn, Judge.

Action by S. Gortikov against the Illinois Central Railroad Company. From a judgment for plaintiff, assessing his damages at \$1,000, defendant appeals. Affirmed.

McWillie & Thompson and Mayes & Longstreet, for appellants.
Wm. C. McLean, for appellee.

CALHOON, J. This is an action for damages for being forcibly ejected from a train. It is absolutely certain that Mr. Gortikov bought, paid for, and received a round-trip ticket at Tucson, Ariz., good from that place to Chicago, Ill., and return, over the route on which he was ejected. On that ticket and over that route he went without question from Tucson to Chicago, and was on his return; and it is also certain that, pursuant to the directions of his ticket, he identified himself to the agent at Chicago and returned on that same ticket to and south of Memphis, Tenn., and was ejected at Grenada, Miss. The cause of his being put off, according to his testimony, was that the conductor said it was a "bogus ticket," claiming that the plaintiff had purchased it from a scalper, because the original ticket had been issued to a female. Whether the ticket was in fact, or not, when bought, punched in the wrong place, so as to show that it was a female, is in our view wholly immaterial. That was a matter for the convenience of the railroad company, and no passenger should be held to be bound by the mistakes of the agent in using his punch. It will be noted that, in the description of the passenger made by the agent at Tucson, the appellee, plaintiff below, is perfectly described even to the fact of his having a mustache.

It is also absolutely certain that the ticket, according to the actual contract made at its purchase, had not expired by several days at the time of the expulsion from the train. This is shown

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by the appellee's testimony, and by the agent who sold him the ticket, and on the face of the ticket, as will appear hereinafter, and, if the agent made a mistake in punching, the passenger should not be held bound. But, according to the testimony for the plaintiff below, no other point was made by the conductor in the colloquy between him and the appellee except that it was issued to a female, and he refused to listen to any explanation or any proofs of identification from the passenger, and there was evidence that the plaintiff below was prepared to make explanation showing his identity, and would not be listened to, that he had about him evidence which would satisfy any reasonable man that he himself was the original purchaser of the ticket and the identical man for whom it was intended. The conductor did not even call upon Gortikov for any explanation, and would not hear it when it was offered. There was also evidence that he was forcibly put off the train, the conductor and the brakeman taking hold of him and making him leave the car, and that at the door the conductor told the marshal of Brenada he wanted him to take the passenger out of the car, and the marshal told him that it was not his business and declined to do so. According to the testimony of the plaintiff there was no talk from the conductor on the subject of an erasure or change in the name until the trial of the cause. However, we have seen the identical ticket, sent to us by consent, and it is perfectly manifest that there never was any erasure. This ticket shows that it was brought October 27, 1904, and that the return limit was punched so as to show December 14th, although that very ticket provides, as all such did, that it is good for 90 days from its date, to be not later than December 31, 1904. This is conclusive of the contract, regardless of the mistake which the agent says he made in punching the ticket, and was a matter for explanation, to say the least of it, if the conductor had made the point or been willing to accept explanation. In any case it is the duty of a conductor, when doubt arises as to a ticket, whether a general ticket or a special touring ticket with reduced rates, to listen to and accept any reasonable explanation offered, or take chances. *Railroad Co. v. Harper*, 83 Miss. 560, 35 South. 764; *Railroad Co. v. Holmes*, 75 Miss. 371, 23 South. 187; *Railroad Co. v. Riley*, 68 Miss. 765, 9 South. 443, 13 L. R. A. 38, 24 Am. St. Rep. 309; *Railroad Co. v. Drummond*, 73 Miss. 813, 20 South. 7—cited by counsel for appellee. This court is in line with those cases holding that a passenger is not required to see that the selling agent of the ticket made the proper punch marks. The fact that the passenger did not do so does not destroy the validity of the contract. *Railroad Co. v. Holmes*, 75 Miss. 371, 23 South. 187.

In the case at bar it was clearly the conductor's duty to accept explanation, regardless of the punch marks. But, as we

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have said, the evidence on the part of the plaintiff is that the conductor made no such objection to the ticket, but put his refusal explicitly on the ground that the ticket had been issued to a female, and was a "bogus ticket." Looking to all that appears on this ticket, the expulsion was unnecessary, and from the circumstances shown on the part of the plaintiff it is our opinion that they warranted the recovery of both actual and exemplary damages. Examining the whole ticket, it is clear that the contract was not to expire until December 31st, and, if the punch mark contradicted this, it should not have been considered by the conductor, because the printed contract should be taken most strongly against the railroad company which issued it.

It is useless to comment on the proposition that the provision of the ticket, under the head of "Caution," to the effect that, in cases of doubt between the passenger and the conductor, the passenger should pay the rate which the conductor demanded, and get a receipt from him, and report to the general office, and then "the same will receive prompt attention." It is simply advice, and no part of the 10 provisions in the ticket. It is a suggestion to the passenger that he could pay the fare, and, if he did it, the general office, on his report, would give it prompt attention, without even specifying that the amount in cash he had paid would be refunded. That this is not a part of the contract is plain. Hutchinson on Carriers, p. 666, § 580, and the authorities there cited, referred to by counsel. Even if a part of the contract, it would be unreasonable and void, as held in the cases cited in the notes to *Cherry v. C. & A. R. R. Co.*, 109 Am. St. Rep. 830, *Railroad Co. v. Baker*, 7 L. R. A. (N. S.) 103, and *O'Rourke v. Citizens' Street Ry. Co.*, 76 Am. St. Rep. 639, referred to by counsel. The circumstances developed by the evidence for the plaintiff below in this case and believed by the jury make it a willful wrong in the conductor to eject without listening to explanation. *Illinois Cent. R. Co. v. Harper*, 83 Miss. 570, 35 South. 764, 64 L. R. A. 283, 102 Am. St. Rep. 469.

Taking the instructions as a whole, we find nothing authorizing this court to reverse.

Affirmed.

CHICAGO, B. & Q. R. CO. v. MORRIS.

(Supreme Court of Wyoming, Feb. 10, 1908.)

[93 Pac. Rep. 664.]

Writ of Error—Review—Findings on Conflicting Evidence.—A special finding by the jury on conflicting evidence will not be disturbed on writ of error.

Carriers—Carriage of Live Stock—Duty to Furnish Suitable Cars—Liability for Injuries.*—A carrier of live stock is bound to furnish cars suitably equipped to safely transport horses to their destination, and is liable for injuries to them from a failure to do so.

Same—Duty of Shipper to Inspect Car.†—A shipper of horses is not required to inspect a car furnished by a carrier for their transportation to see if it is properly equipped.

Same—Liability of Carrier for Delay.‡—While it is not every delay that will entitle a shipper of live stock to damages, if a delay is caused by the carrier's negligence and contributes to the injury of the stock, it constitutes a proximate cause and is ground for damages.

Same—Actions—Evidence—Proximate Cause.—Evidence examined, and held sufficient to support a special finding that the proximate causes of an injury to horses while being transported by a carrier were the defective condition of the car and delay in transportation.

Same—Question for Court—Construction of Shipper's Contract.—The rights, duties, and obligations created by a contract of shipment between a shipper and carrier are questions of law for the court.

Writ of Error—Review—Harmless Error—Special Findings.—In an action by a shipper against a carrier on an express contract to transport horses, where the question whether it was plaintiff's duty to accompany the stock was improperly submitted to the jury as a question of fact, their answer that there was no evidence showing such a duty was not prejudicial to defendant.

Carriers—Carriage of Live Stock—Injury—Vices and Propensities—Burden of Proof.§—That a carrier may avoid liability for injuries

*See foot-notes appended to *St. Louis, etc., Ry. Co. v. Marshall* (Ark.), 16 R. R. R. 38, 39 Am. & Eng. R. Cas., N. S., 38; extensive note, 23 R. R. R. 176, 46 Am. & Eng. R. Cas., N. S., 176.

†See extensive note, 11 R. R. R. 419, 34 Am. & Eng. R. Cas., N. S., 419.

‡See second foot-note appended to *Goodin & Goodin v. Southern Ry. Co.* (Ga.), 25 R. R. R. 590, 48 Am. & Eng. R. Cas., N. S., 590; foot-notes appended to *Yazoo, etc., R. Co. v. Blum Co.* (Miss.), 24 R. R. R. 86, 47 Am. & Eng. R. Cas., N. S., 86.

§See foot-notes appended to *Brennison v. Pennsylvania R. Co.* (Minn.), 25 R. R. R. 105, 48 Am. & Eng. R. Cas., N. S., 105; foot-notes appended to *Tiller & Smith v. Chicago, etc., Ry. Co.* (Iowa), 24 R. R. R. 581, 47 Am. & Eng. R. Cas., N. S., 581; foot-notes appended to *Louisville & N. R. Co. v. Brown* (Ky.), 24 R. R. R. 81, 47 Am. & Eng. R. Cas., N. S., 81; *Alexandre v. Atlantic Coast Line R. Co.* (N. Car.), 23 R. R. R. 485, 46 Am. & Eng. R. Cas., N. S., 485.

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to horses during transportation on the ground of their vices and natural propensities, it must appear that the injuries occurred by reason of such vices and natural propensities alone, or in conjunction with some innocent cause, and the burden is upon the carrier to prove that fact.

Same—Sufficiency of Evidence—Negligence.—In an action by a shipper against a carrier for injuries to horses during transportation, evidence held sufficient to support a finding that the carrier was negligent.

Negligence—Proximate Cause—Question for Jury.—The proximate cause of an injury is a question for the jury.

Carriers—Carriage of Live Stock—Actions—Sufficiency of Evidence.—In an action by a shipper against a carrier for injuries to horses during transportation, evidence held to sustain a verdict for plaintiff.

Writ of Error—Reservation of Grounds of Review—Motion for New Trial—Statement of Grounds.—The allegation, as ground of a motion for a new trial, of "errors of law occurring at the trial," is too general and indefinite to present for review, in an action by a shipper against a carrier for injuries to live stock in transit, the question whether the court erred in refusing to permit the carrier to show that it was a custom to attach car loads of stock at the rear end of the train, but the particular error and matter complained of should be specified.

Trial—Verdict—Special Findings—Right to Judgment.—The right to a judgment upon special findings returned with a general verdict, as expressly allowed by Rev. St. 1899, § 3656, is limited to cases where there is an inconsistency between the special finding and the general verdict by section 3657, providing that when the special finding of facts is inconsistent with the general verdict the former shall control the latter, and the court may give judgment accordingly.

Carriers—Carriage of Live Stock—Loss—Actions—Evidence—Negligence.—The fact that during transit the door of a stock car in which horses were being transported was found partly open, the bull board down, and a horse missing, is evidence of the carrier's negligence in failing to furnish a car provided with a secure and safe door to prevent the horses from falling out or escaping.

Same—Damages—Excessive Damages.—Plaintiff shipped a car load of horses over defendant's railroad. By reason of the defective condition of the car and delay in transportation eight of them were injured by falling down in the car, and one escaped through the door in transit. Of the horses injured, one died, and the others were sold at prices much lower than they would have brought had they not been injured. Held, that \$293 damages, being within the evidence, and not excluding the limit of value in the contract of shipment, was not excessive.

Error to District Court, Sheridan County; Carroll H. Parmelee, Judge.

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Action by A. J. Morris against the Chicago Burlington & Quincy Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Lonabaugh & Wenzell and *N. K. Griggs*, for plaintiff in error.
Robert P. Parker, for defendant in error.

SCOTT, J. This action was brought in the district court of Sheridan county by the defendant in error, as plaintiff, against the plaintiff in error, as defendant, to recover damages for injury to horses while in transit over plaintiff in error's line of railway, alleged to have been sustained by reason of the negligence of the company. The case was tried to a jury, and a general verdict returned December 13, 1906, in favor of Morris and against the company for the sum of \$295, as damages and interest thereon from October 16, 1905. At the same time the jury returned their separate answers to interrogatories which the court submitted to them as follows, viz.: "Int. 1. Was the car containing plaintiff's horses overloaded or overcrowded? Ans. No. Int. 2. Did the overloading or the overcrowding of the car in question cause, or contribute to, the falling or injuring of plaintiff's horses while in transit between Aberdeen and Sheridan? Ans. Not overcrowded or overloaded. Int. 3. Was it the duty of the plaintiff to go himself, or have some one else do so, along with the car of horses in question, while same was in transit between Aberdeen and Sheridan, to prevent his horses from falling and being trampled upon while in the car in such transit? Ans. No evidence to show. Int. 4. Was the falling or the injuring of plaintiff's horses, while in transit between Aberdeen and Sheridan, due to any act of negligence or want of care of defendant? And, if so, state specifically in what such negligence or want of care consisted, and also state by whose testimony or by what evidence such negligence or want of care of defendant has been shown. Ans. Bad order car and delayed train. By defendant's witness and all others. Int. 5. Was the falling or injury of plaintiff's horses, while in transit between Aberdeen and Sheridan, caused by any rough or unusual handling of the car containing such horses? And, if so, state specifically where such rough and unusual handling occurred, and by whose testimony or by what evidence such fact is established. Ans. No testimony." A motion by the company for judgment on the special findings, as also a motion for a new trial, was overruled, and the company brings the case here on error.

1. The company assigns as error the overruling of its motion for a new trial. It is contended, first, that the evidence is insufficient to support the verdict; second, that the verdict is contrary to law; third, that it was entitled to judgment upon its motion therefor upon the special findings.

It is admitted in the pleadings that plaintiff in error is and was

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a railroad company operating a line of railroad at the time of the shipment of the horses from Billings, Mont., to St. Louis, Mo., and a common carrier transporting merchandise and live stock for hire, and that it received a car load of horses from the defendant in error as such common carrier, and undertook to transport them over its line to their destination. There was conflicting evidence upon the question as to whether the car was overloaded or overcrowded. The jury, as seen by their special finding No. 1, found that it was not, and, in view of the conflicting evidence upon that question, such finding cannot be disturbed. The jury having so answered the first interrogatory, it follows that their second finding is correct, for, if there was no overloading or overcrowding of the stock in the car, it is apparent that the injury to the animals cannot be attributed to that cause.

The evidence tended to show that upon the plaintiff's application the company, on the 16th day of October, 1905, furnished him a car on its side track and at its loading pen at Aberdeen, Mont., for the purpose of shipping a car load of horses from that point to East St. Louis. The car was loaded about 11 o'clock at night, and shortly thereafter it was switched from the side track and attached to a freight train in rear of 47 car loads of lumber, and next forward of the caboose. The car had a broken drawbar on the front end, and was coupled to the car in front by a chain, there being about 18 inches of slack which was not taken up by the chain. The train was equipped with air brakes which were coupled onto the damaged car. The boiler of the engine was foaming, and the train was overloaded, so that in climbing Parkman Hill in going south from Aberdeen the train crew had to divide the train, and it was hauled in separate sections up that hill. The train was also delayed by having to wait at meeting points, and did not reach Sheridan, a distance of 40 miles from the starting point, until some time between 12:30 and 2:30 in the afternoon of the next day. Upon arrival at Sheridan the car was allowed to stand in the yards from 1½ to 1¾ hours before the horses were unloaded. It was then found that eight of the horses had been injured by having fallen in the car and having been trampled upon, one dying shortly thereafter, three were in such condition that they could not be shipped further, and the remaining four were reloaded with the rest. The three left in the stockyards at Sheridan were afterwards sold by the company, and the other four so injured were sold by the shipper at their destination at prices much below what they would have brought had they been free from injuries. At Newcastle, Wyo., the horses were again unloaded for water and feed, and, with the exception of those left at Sheridan, none were missing from the shipment. The horses were again reloaded, and upon arrival at Alliance, Neb., it was found that one horse was miss-

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that entitles a shipper to damages, yet if such delay was by reason of negligence of the company and contributed to the injury it constituted a proximate cause, and an action for damages would lie. The overloading an engine, or a defective engine which causes a delay, is evidence of negligence (Cleveland, etc., R. Co. v. Heath, 22 Ind. App. 47, 53 N. E. 198; Mich. So., etc., Ry. Co. v. McDonough, 21 Mich. 165, 4 Am. Rep. 466; McCrary v. R. Co., 109 Mo. App. 567, 83 S. W. 82), and, if such negligence contributed to the injury, there is no reason why damages should not be recoverable.

Negligence per se was not shown, but there was evidence sufficient to go to the jury, and therefore sufficient to sustain a finding of negligence. It was for the jury to say from all the evidence whether such negligence constituted the proximate cause of the injury to the animals, and by their special finding No. 4 they found the proximate cause to be "bad order car and delayed train." If the damaged car and the delay in transit increased the hazard and risk of injury to the horses by getting down and being trampled upon and injury also resulted in inability to unload the animals at an earlier hour, this court cannot say that the jury's finding is wrong. It would seem reasonable that the longer they were in transit and the consequent delay in getting those up which had fallen, together with the character and kind of animals, and their need of care and attention, should all be taken into consideration in determining whether such delay contributed to and was a proximate cause of their injury. This was a question of fact for the jury to determine, and we are of the opinion that the special finding No. 4 is not contrary to the evidence, and that it is sustained by sufficient evidence.

It is contended that the verdict is contrary to law, and in support of this contention it is argued that the plaintiff was guilty of contributory negligence in failing to go or send some one along with the horses and attend to their needs and wants during transit between Aberdeen and Sheridan, and also that owing to the natural propensities of the horses and their liability to injure each other the injuries must be attributed to such propensities or vice, and that the company by the terms of the contract was not liable therefor. The contract of shipment provided that the company should furnish free transportation for the owner or his agent to accompany the horses, and that he or his agent should have sole charge of the car and horses, and that the company should not be responsible for such attention and care. The evidence is that the plaintiff and a stock inspector, together with the train crew, loaded the horses at Aberdeen. The plaintiff testifies that after loading them he left the car and horses in charge of the train crew. The evidence of the conductor who was in charge of the train is to the effect that he knew he was

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not carrying any one on the part of the plaintiff to care for the horses between Aberdeen and Sheridan.

The existence of the contract was one of fact, and was admitted by the parties. The rights, duties, and obligations created thereby were questions of law to be determined by the court. There was some evidence of a custom of stockmen to accompany or send some one along to care for their stock while in transit, but the shipment was under the terms of an express contract, and the rights of the parties must be measured thereby? A custom to that effect and a failure to comply therewith were not pleaded. The jury by their answer to interrogatory No. 3 stated that there was no evidence to show that it was the duty of the plaintiff to go, or have some one else do so, along with the car of horses while same was in transit between Aberdeen and Sheridan to prevent his horses from falling or being trampled upon while in the car in such transit. This question, we think, is one of law and not of fact, and that it was therefore improperly submitted to the jury, and its answer thereto—that there was no evidence—cannot be regarded as prejudicial to the defendant for that reason. That this was a question of law was recognized by the court in its instruction to the jury as follows: "You are instructed that the duty of looking after the horses in question, while on the way between Aberdeen and Sheridan, devolved on the plaintiff. Hence, if he allowed such horses to be transported between those points, without going along himself, or having some one do so, to look after them on the way, and some of them got down and were injured because of such want of care, he cannot recover in this action." In another instruction the jury were told that in order for the plaintiff to recover for injury to his horses he must affirmatively prove by a preponderance of the testimony that they were injured alone through the negligence of the company. The failure of the plaintiff to accompany or send some one along to care for his horses, under the verdict and finding of the jury, neither contributed to nor was it the proximate cause of the injuries.

If the injuries to the horses were due solely to their vices and natural propensities, then the company was not liable therefor, but in order for this to be a defense it must appear that such vices or propensities constituted the sole proximate cause of the injuries. 5 Am. & Eng. Ency. of Law, 445. It is true that the evidence shows that horses of this character are nervous and excitable, and would be more liable to get down in the car for the first hundred miles of the journey, and that that fact was known to the shipper as well as the company. The jury did not find that the natural propensities or vices of the animals was the sole proximate cause of the injuries, and upon the whole evidence it was for them to determine what the proximate cause of the in-

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juries was (*Giblin v. National S. S. Co.*, 8 Misc. Rep. 22, 28 N. Y. Supp. 69), and to have been the proximate cause, as a defense, the injuries must have occurred by reason of the natural propensities alone or in conjunction with some innocent cause (*Chicago, etc., R. Co. v. Harmon*, 12 Ill. App. 54), and the burden was upon the company to show that fact. 5 Cyc. 469. The jury by their special finding found the proximate cause of the injuries to have been bad order of car and delayed train. We do not think that the injuries could upon the evidence have been the result solely of the natural propensities of the animals, either alone or in conjunction with an innocent cause, for the damaged car and delayed train were not, nor could they be considered, an innocent cause. We are of the opinion that the verdict is sustained by sufficient evidence, and that it is not contrary to law.

2. It is urged in argument that the court erred in refusing to permit the defendant to show that it was the custom to attach car loads of stock at the rear end of the train. The motion for a new trial does not specify this ruling as a ground therefor, unless it be included in the general ground defined in the statute and alleged in the motion as "errors of law occurring at the trial." The ground is too general and indefinite, and upon the record it does not affirmatively appear that the specific question here argued was brought directly to the lower court's attention. *Boburg v. Prahl*, 3 Wyo. 325, 23 Pac. 70. While it may have been argued and submitted to that court, the only way of showing that fact and presenting the question for review is by setting out and specifying in the motion the particular error and matter complained of. Section 853, Elliott on App. Proc.

3. It is assigned as error that the court erred in overruling the company's motion for judgment on the special finding of facts. The interrogatories were submitted to the jury to be answered and returned with their general verdict, in pursuance to the provisions of section 3656, Rev. St. 1899. Section 3657, Rev. St. 1899, is as follows: "When the special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court may give judgment accordingly." The right to a judgment upon the special finding of facts under these provisions of the statute is limited to those cases where there is an inconsistency between the special finding and the general verdict, and, unless there is such an inconsistency as to be irreconcilable, such a motion should be denied. *Davis v. Turner*, 69 Ohio St. 101, 116, 68 N. E. 819. The special finding of facts is reconcilable with the general verdict, and, that being the case, the company was not in a position to ask affirmative action on the part of the court upon its motion for judgment based upon such finding.

4. The correctness of the instructions is not here questioned,

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nor is the right to recover the value of the horse which was lost from the car between Newcastle and Alliance seriously questioned. There was some conflicting evidence as to whether the horse was loaded with the others, but that was a question for the jury, and, if so loaded, the condition of the door at the time the horse was found to be missing would be sufficient evidence to sustain the verdict on the ground of negligence on the part of the company in failing to furnish a car provided with a secure and safe door to prevent the horses from falling out or escaping. *Smith v. New Haven, etc., R. Co.*, 12 Allen (Mass.) 531, 90 Am. Dec. 166; *Pratt v. Ogdenburg, etc., R. Co.*, 102 Mass. 557; *Indianapolis, etc., R. Co. v. Strain*, 81 Ill. 504; *Betts v. Chicago, etc., R. Co.*, 92 Iowa, 343, 60 N. W. 623, 26 L. R. A. 248, 54 Am. St. Rep. 558; *Central of Georgia R. Co. v. James*, 117 Ga. 832, 45 S. E. 223; *Root v. New York, etc., R. R. Co.*, 83 Hun, 111, 31 N. Y. Supp. 357.

5. It is urged that the damage awarded by the jury is excessive. The damage was variously estimated by different witnesses, and the amount found by the jury was within the evidence, and does not exceed the value placed upon the animals in the contract of shipment, and to which value the plaintiff limited the amount of his recovery for injury to or loss of the horses while in transit. The argument upon this question seems to be that a recovery, if at all, must be for the value of the horse which was lost from the car, and that there was no liability for damage for injury to the horses while in transit between Aberdeen and Sheridan. This contention, as we have seen, is not correct, for the plaintiff was entitled to recover for injuries to them as well. We are of the opinion that the damage assessed by the jury is not excessive.

No prejudicial error appearing in the record, the judgment will be affirmed.

Affirmed.

HOUTZ v. UNION PAC. R. CO.

(Supreme Court of Utah, Jan. 27, 1908.)

[93 Pac. Rep. 439.]

Carriers—Transportation of Property—Limitation of Liability—Nature of Right.*—Though common carriers are as a general rule liable as insurers of property, and are responsible for loss or damage, unless caused by the act of God or of the public enemy, this liability may be limited by a fair and reasonable contract as to any loss not caused by its negligence or misconduct, or that of its servants.

Same—Liabilities Subject to Limitation—Negligence or Misconduct.*—A carrier cannot by contract exempt itself from nor limit its liability for the loss of or damage to property caused by its negligence or misconduct or that of its servants.

Same—Transportation of Live Stock.†—Provisions in a contract with a carrier that a shipper of sheep assumed all risk of damage from delay in transportation, or loss or damage from any other cause than willful or gross negligence, and other provisions exempting the carrier from or limiting its liability for loss or damage from failure to exercise a proper degree of care, contravene public policy and are void.

Same.—A contract provision that the rules, regulations, and conditions prescribed by a carrier of live stock, as evidenced by its published tariffs, classifications, and circulars, were binding on the shipper, and that his signature of the contract was conclusive evidence of his knowledge of and assent to the conditions thereof, is void.

Appeal—Review—Findings—Effect.—Findings by the court as to a carrier's delay and negligence in the transportation of sheep are binding on the carrier on appeal.

Carriers—Transportation of Live Stock—Limitation of Liability—Validity.‡—A stipulation with a carrier of live stock, fairly entered

*For the authorities in this series on the question whether a common carrier may limit its liability, see foot-notes appended to *Adams Express Co. v. Walker* (Ky.), 24 R. R. R. 145, 47 Am. & Eng. R. Cas., N. S., 145; foot-notes appended to *Baltimore & O. R. Co. v. Doyle* (C. C. A.), 24 R. R. R. 129, 47 Am. & Eng. R. Cas., N. S., 129; foot-notes appended to *Arthur v. Texas & Pac. Ry. Co.* (U. S.), 23 R. R. R. 583, 46 Am. & Eng. R. Cas., N. S., 583; foot-notes appended to *Chesapeake & O. Ry. Co. v. Beasley, Conch & Co.* (Va.), 23 R. R. R. 168, 46 Am. & Eng. R. Cas., N. S., 168; *Denver, etc., R. Co. v. Whan* (Colo.), 23 R. R. R. 70, 46 Am. & Eng. R. Cas., N. S., 70.

†For the authorities in this series on the question whether a carrier of live stock can limit its liability, see foot-notes appended to *Reynolds v. Great Northern Ry. Co.* (Wash.), 20 R. R. R. 70, 43 Am. & Eng. R. Cas., N. S., 70.

‡See foot-notes appended to *Union Pac. R. Co. v. Thompson* (Neb.), 24 R. R. R. 123, 47 Am. & Eng. R. Cas., N. S., 123.

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into and reasonable under all the circumstances, requiring the presentation of a claim for loss or damage, is not ineffectual in all cases where the loss or damage results from negligence.

Same.—Where a contract for the shipment of sheep limits the carrier's liability to loss from willful or gross negligence, a paragraph requiring the presentation of a claim within 10 days as a condition of liability must be construed as referring only to claims for willful or gross negligence.

Same.†—A contract exempting carrier of sheep from liability except for willful or gross negligence, and then only on presentation of a claim, is void.

Trial—Findings by Court—Conformity to Pleading and Evidence.—

In an action for injuries to a shipment of sheep, a finding, not based on any pleading or evidence, that a stipulation requiring notice within 10 days of claim for damage is reasonable, is a mere conclusion of law, without effect.

Appeal from District Court, Second District; J. A. Howell, Judge.

Action by John S. Houtz against the Union Pacific Railroad Company. From a judgment in favor of defendant, plaintiff appeals. Reversed and remanded.

Heywood & McCormick, for appellant.

P. L. Williams, Geo. H. Smith, and Jno. G. Willis, for respondent.

STRAUP, J. This is an action to recover damages for an injury to live stock, consisting of sheep, alleged to have been occasioned through the negligence of the defendant, a common carrier, in transporting the sheep from Soda Springs, Idaho, to Omaha, Neb. The case was tried to the court, who, among other things, found that the defendant, at Schuyler, Neb., negligently delayed the carriage of the sheep, and there negligently held and confined them on its cars for a period of 72 hours, and at a place where the sheep could neither be unloaded, watered, nor fed; that during the time the sheep were there delayed the plaintiff frequently urged the defendant to transport and convey the sheep to a place where they could be unloaded, fed, and watered, and, although the defendant could well have done so, nevertheless it negligently failed and refused to do so; and that in consequence thereof the plaintiff was damaged in the sum of \$1,326 by an excess shrinkage in weight of the sheep, and in the further sum of \$954 because of a drop in the market occurring within the time of the negligent delay and detention. The court further found that the plaintiff and defendant entered into a written contract by the terms of which it was stipulated (quoting from findings); "(1) That the carrier shall not be liable for the loss or damage

See (†) on preceding page.

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of, nor for any injuries received by, any of said stock, unless the same is the direct result of willful misconduct or actual negligence of said carriers, their agents, servants, or employees. (2) That the shipper agreed to load and unload and reload all said stock at his own expense, and to feed, water, and attend to the same at his own risk, while it was in any stockyard. (3) That the shipper assumed all the risk of any of them being weak and maiming each other or themselves in consequence of cold or suffocation or any other defects, and the shipper agreed to assume all the risk of damage which may be sustained by reason of delay in transportation, or loss or damage for any other cause, or anything not resulting from the willful negligence of the defendant. (4) It is also specially agreed and provided that the defendant should not be liable for any loss or damage to said stock by causes beyond its control, or by floods or fire, shrinkage in weight, changes in weather, heat or cold, or any other thing or cause not directly the result of gross negligence on the part of said defendant, its agents, or servants. (5) Said contract further provided that unless claims for loss or damage or detention are presented within 10 days from the date of unloading said stock at destination, and before said stock has been mingled with the other stock, such claims shall be deemed to be waived, and the defendant under said contract was discharged from all liability thereby. (6) It was still further provided in said contract that the rules, regulations, and conditions prescribed by the defendant for the transportation of live stock, as evidenced by their published tariffs, classifications, and circulars in force and effect at said time, were binding upon said plaintiff, and that the signing of the contract by the shipper, or his agent, was and should be conclusive evidence of the knowledge, assent, and agreement to each and every stipulation and condition thereof by said shipper, the plaintiff." It was further found that no claim was presented to the defendant within 10 days, nor before the mingling of the sheep with other sheep, and not until 24 days after the sheep reached their destination, and that the "provision requiring the claim to be presented within 10 days after the unloading of the sheep and before the sheep had been commingled with other sheep is a reasonable provision under the circumstances." Judgment was rendered for the defendant on the sole ground that the claim was not presented "within 10 days after the arrival of the sheep at their destination and before having been mingled with other sheep." The plaintiff appeals.

The only question presented by the appeal is with respect to the validity and effect of the contract. As a general rule common carriers are held liable as insurers of property intrusted to them, and are held responsible for any loss of or damage to the property, unless occasioned by the act of God or by the public enemy.

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The law is, however, well settled in this country that the carrier's liability as an insurer may be limited by special contract, when fairly entered into and reasonable in its terms, and that it may limit its common-law liability for any loss, provided such loss is not the result of its negligence or misconduct, or that of its servants. The rule is equally well settled that the carrier cannot make a valid contract by which it is to be exempt from liability or any loss or damage resulting from its misconduct or negligence, or that of its servants; nor can its liability for a failure to exercise a proper degree of care in the transportation of property intrusted to it be limited by special contract. *Williams v. O. S. L. R. Co.*, 18 Utah, 210, 54 Pac. 991, 72 Am. St. Rep. 777; 5 Am. & Eng. Ency. Law, 288-308, and cases there cited. These principles, of course, are not disputed. The contention made by respondent is that the stipulation requiring the presentation of a claim as a condition precedent of liability is not violative of these principles. The action was grounded on defendant's negligence. The court found plaintiff's loss and damage to be the result of such negligence. That the provisions of the contract whereby it was stipulated that the plaintiff assumed all risk of damage which might be sustained by reason of delay in transportation, or loss or damage for any other cause or thing not resulting from the willful or gross negligence of the defendant, and all other provisions exempting the defendant from or limiting his liability for loss or damage resulting from its failure to exercise a proper degree of care, contravene public policy, and are void, is not seriously disputed. For the same and other reasons not necessary to here state, it may be said that paragraph 6 of the contract is also invalid.

At a former hearing of this case we rendered an opinion, which was filed, but not published, wherein it was in effect held by us that the stipulation in the contract requiring the presentation of a claim as a condition precedent of liability for loss or damage should only apply to and be given effect in case of a loss or damage not occasioned by the defendant's negligence or misconduct; and, as the court found plaintiff's damage to be the result of defendant's negligence, the stipulation was held to be inoperative. We reached this conclusion upon the theory that, when an injury has been sustained by the negligence of the carrier, a complete cause of action arose upon the infliction of the injury; that to permit the carrier by special contract to make an additional requirement, such as the presentation of a claim as a condition precedent of liability, and before a right of action existed, restricted or limited the right which the shipper would have to maintain an action for such negligence, and to that extent limited or conditioned the carrier's liability for negligence; that, if it was against public policy to permit a carrier in advance to

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contract against its negligence, then it followed that it could not by special contract in advance impose conditions precedent of liability for a loss or damage occasioned by its negligence; that, if such a condition as here could be lawfully imposed, then other conditions could also be imposed, if fairly entered into, and if found to be reasonable under the circumstances of the case; and hence the stipulation, when applied to a loss or damage occasioned by the negligence of the carrier, was against the policy of the law and ineffectual. These views seem to be supported by the following authorities: 6 Cyc. 505; *Mo. Pac. Ry. Co. v. Harris*, 67 Tex. 166, 2 S. W. 574; *Ormsby v. U. P. R. Co.* (C. C.) Fed. 706; *Smitha v. L. & N. R. R. Co.*, 86 Tenn. 198, 6 S. W. 209; *So. Express Co. v. Crook*, 44 Ala. 468, 4 Am. Rep. 140; *So. Exp. Co. v. Bank of Tupelo*, 108 Ala. 517, 18 South. 664; *Baltimore & Oh. Exp. Co. v. Cooper*, 66 Miss. 558, 6 South. 327, 14 Am. St. Rep. 586; *Sanford v. Housatonic R. R. Co.*, 11 Cush. (Mass.) 155; *Adams Exp. Co. v. Reagan*, 29 Ind. 21, 92 Am. Dec. 332; *G., C. & S. F. Ry. Co. v. York & Johnson*, 2 Willson, Civ. Cas. Ct. App. § 813. The rule in 6 Cyc. 505, *supra*, is stated as follows: "It is usual to insert in bills of lading, or other contracts for shipment, a stipulation that written notice of a claim for loss of or damage to the goods shall be given to the agents of the carrier within some specified time, such as 30 or 90 days, and that unless such notice is given there will be no liability on the part of the carrier, and such stipulations are generally upheld so far as they are found to be reasonable. Cases holding such stipulations to be invalid are usually based on the ground that the terms thereof are unreasonable, rather than on the general invalidity of such conditions. But they are regarded as limitations of the carrier's liability, and therefore as ineffectual against a claim for loss or injury due to the carrier's negligence, and also as invalid where limitation of common-law liability is prohibited by statute." Cases are cited from several states in support of the text. In the case of *Rathbone v. Railway Co.*, 140 N. Y. 48, 35 N. E. 418, the court says: "It is well settled that these stipulations in the contract will not be construed to relieve the carrier from liability for his own negligent acts. His duty and obligation to exercise a proper degree of care of the property while in his custody is not affected by them. Full and sufficient scope is given to their operation when it is held that they exempt the carrier from his common-law responsibility as an insurer of the property."

After our opinion was rendered, a petition for rehearing was filed. Upon further reflection we became somewhat doubtful of our position in this regard. A rehearing was therefore granted, and the case has again been argued and resubmitted. That the courts greatly divide on this question there can be no doubt. It

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may also be conceded that the greater number of cases hold, and many text-writers seemingly declare the law to be contrary to the views expressed by us. Among them may be cited the following: 4 Elliott on Railroads, § 1512; 1 Hutchinson on Carriers, § 442; Moore on Carriers, 333; 5 Am. & Eng. Ency. Law, 321. Many cases are cited by these text-writers. It is not necessary to set them forth here. The rule declared in 1 Hutchinson on Carriers, § 442, is as follows: "It is frequently the custom for the carrier to insert in the contract of shipment a condition that, in the event of loss, the owner shall give notice of his claim within a specified time. Such conditions are usually to the effect that the notice shall be in writing and presented to some officer or agent of the carrier, either before the goods are removed from the point of destination, or within a certain time thereafter, or within a designated time after the loss has occurred; and when such conditions are reasonable the owner will be precluded from the right to maintain an action against the carrier, unless he has presented the notice within the time stated and in the manner provided." Whether the author in the above quotation is dealing with a "loss" for which the carrier is liable as an insurer, or with a loss or damage occasioned from any cause for which the carrier is liable, including his misconduct and negligence, is not clear. The same is true of the statement in 4 Elliott, § 1512, where it is said: "A valid contract may be made requiring claims for loss or damage to freight to be presented in a certain manner or within a certain time, provided it is reasonable." In Moore on Carriers, at page 333, it is said: "The carrier may lawfully, by contract with the shipper made by clause or stipulation in the bill of lading or shipping receipt or otherwise, provide a reasonable time within which the shipper shall present his claim or give notice of claim for loss or damage, and the manner of giving such notice or presenting his claim, and limit its liability to cases in which the claim shall be presented or notice given in accordance with the terms of the contract." But on page 336 the following statement is made by the same author: "Most of the authorities sustain such stipulations, even where the loss is one caused by the defendant company's negligence. In Texas such a stipulation is held to be a limitation of the common-law liability of the carrier, and of no effect where the loss is one resulting from the carrier's negligence." While some of the cases cited in support of these texts pertain to claims of loss or damage for which the carrier was sought to be held liable as an insurer, yet others pertain to claims of loss or damage occasioned by the negligence of the carrier. Among the latter may be cited: *Goggin v. Kan. Pac. Ry. Co.*, 12 Kan. 416; *Sprague v. Mo. Pac. Ry. Co.*, 34 Kan. 347, 8 Pac. 465; *W. & W. Ry. Co. v. Koch*, 47 Kan. 753, 28 Pac. 1013; *The St. Hubert*, 107 Fed. 727, 46 C. C. A. 603; *The Westminster*, 127

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Fed. 680, 62 C. C. A. 406; So. Ry. Co. v. Adams, 115 Ga. 705, 42 S. E. 35; Dawson v. Railway Co., 76 Mo. 514; Hatch v. Minneapolis, etc., Ry. Co. (N. D.) 107 N. W. 1087. The above are not all the cases that are cited on this point; but these sufficiently show that in a number of cases the requirement of notice or the presentation of a claim was held to apply to a loss or damage occasioned by the carrier's negligence, and by reason of their citation in support of the foregoing texts it may fairly be inferred that the text-writers intended the rule declared by them to apply the cases of loss or damage resulting from negligence or misconduct, as well as from other causes.

The cases cited from Illinois, Wisconsin, and New York are not in point, for the reason the rule obtained in those jurisdictions that it was not against the policy of the law to contract against ordinary negligence. All the courts giving effect to such stipulations, when applied to a loss or damage by negligence, in most positive terms assert that it is against public policy to permit a common carrier by special contract to relieve itself from, or limit its liability for, a loss or damage incurred by its negligence or misconduct; but it is asserted that the giving effect to such a stipulation in such a case is not violative of this principle. Some courts have given reasons for such a conclusion. Others merely discuss the question as to whether the stipulation was reasonable under all the facts and circumstances of the case, and, when found to be so, merely assert that it was not against the policy of the law. In some cases the conclusion is supported by the citation of cases where the stipulation was given effect in case of loss for which the carrier was sought to be held liable as an insurer. We well can understand why a stipulation, when reasonably and fairly entered into, requiring notice of claim of loss as a condition precedent to charge the carrier with liability as an insurer, does not contravene the policy of the law under consideration; for it is readily perceived that a loss or damage may occur by accident, dangers of carriage or navigation, and from other causes for which the carrier, at common law, is liable, but against which human skill and vigilance could ordinarily not have guarded. The principle is well illustrated in the case of So. Pac. Exp. Co. v. Caldwell, 21 Wall. (U. S.) 264, 22 L. Ed. 556. Many such losses will and do occur of which the carrier has no knowledge until notified, and unless a notice is given within a reasonable time no opportunity of investigating and ascertaining the facts is afforded it. A stipulation, therefore, that the carrier shall be relieved from the rigid and severe rules of the common law, which hold it liable as an insurer, unless notice of claim of loss shall be given in order that it may protect itself against imposition and fraudulent claims, is no longer regarded as contravening the policy of the law. When the carrier is

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charged with liability as an insurer, the question of negligence is ordinarily not involved. While the plaintiff in such a case must aver and show a breach of duty, he is not required to aver and prove negligence on the part of the carrier. When the carrier and shipper contract with respect to the former's liability as an insurer, they are not contracting with respect to a liability for the carrier's tort or negligence; and, as remarked by Mr. Justice Strong in the Caldwell Case: "The contract is not a stipulation for exemption from responsibility for the defendant's negligence, or for that of their servants. It is freely conceded that, had it been such, it would have been against the policy of the law and inoperative. A common carrier is always responsible for his negligence, no matter what his stipulations may be." The reasons so well stated by that court why the stipulation was not against the policy of the law, when applied to a case of liability as an insurer, and where the question of negligence was not involved, are now given by many courts in cases of damage or injury to property by negligence, as is well illustrated in the case of *Sprague v. U. P. Ry. Co.*, supra. In that case the action was brought against the carrier for negligence in the management of its cars, by reason of which the plaintiff's horses, which were being shipped, were thrown down, bruised, and injured, so that one of them died and the others were disabled. The reason given why the stipulation in the contract of shipment requiring notice of claim as a condition precedent of liability was not against the policy of the law was that it tended "to protect the company from fraud and imposition in the adjustment and payment of claims for damages by giving the company a reasonable opportunity to ascertain the nature of the damage and its cause."

As we have attempted to show, in a case where the carrier is sought to be held liable as an insurer, there is much reason requiring notice of claim; for, in many instances, the carrier otherwise would not have knowledge of the loss. Even in such case, where it was shown that the carrier had full knowledge of the loss, the failure to give the notice did not defeat the action. When, however, the carrier, through its negligence, inflicts an injury or damage upon property intrusted to it, the reason for the rule no longer exists. The carrier certainly is bound to take notice of its own acts of negligence and of the consequences of such acts. The servants of the carrier undoubtedly are required to be attentive and vigilant in the handling of and looking after property intrusted to their master's care. If, through their negligence, stock under their immediate charge is killed or injured, they, better than any one else, ought to have knowledge of such fact. The carrier has, equally with the shipper, and in many instances much better, opportunity to ascertain the facts and results of its negligence and the extent and nature of the injury or

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damage inflicted by it. We need but to look at the case in hand to show the inapplicability of such a reason. Here the court found that the carriage of the stock was negligently delayed, and at a place where it could not be unloaded, fed, or watered; that the plaintiff at the time frequently urged the defendant to move the stock to a place where it could have been fed and watered, and, although the defendant well could have done so, nevertheless it refused; and that plaintiff's injury and damage was the direct result of such negligence. That the servants of the defendant in charge of the train, and other agents of the defendant connected with the movement and operation of the train, knew of the delay, goes without saying. That stock requires feeding and watering, and that shrinkage in weight is likely to occur if not done, must have been equally well known to them, especially when the plaintiff frequently complained at the time and urged that the sheep be taken to a place where they could be taken care of. The evidence on the part of the plaintiff shows that the delay was unnecessary, his complaints and requests wholly disregarded, and the defendant's refusal to take the sheep to a place where they could have been watered and fed inexcusable. The court in effect so found. Such finding, on this record, is binding on the defendant. To say that it was not bound to take notice of the consequences of such negligent acts, and was not required to exercise any vigilance in that regard until the shipper arrived with a prepared list of injuries, is but to say that it is not bound to discharge the duties and trust with that degree of care and fidelity imposed upon it by law. Such a holding tends to relax the motives for the exercise of such care.

Why was not the defendant, equally with the plaintiff, accorded every opportunity, before the sheep were unloaded at destination and before they left the stockyards, to investigate the results of its negligence and ascertain the nature and extent of the injury inflicted in consequence of such acts? Upon what principle should the carrier, in such case, be excused from exercising any vigilance in such regard until notified by the shipper, and be discharged from all liability if such notice is not given. The facts concerning plaintiff's damages alleged to have been occasioned by a change in the market could as readily have been ascertained 24 days as 10 days after the arrival of the sheep at destination. We cannot well see why the presentation of a claim of such a loss was necessary in order that the defendant might properly protect itself against fraud and imposition, unless it shall be said that in all cases of tort the wrongdoer shall be timely notified of the mischief done by him, in order that he may, while the transaction is fresh, the better investigate the extent of it. But it is said the servants in charge had no means of determining the extent of shrinkage, for such facts could only be determined by a com-

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parison of the weight of the sheep when delivered to the defendant and when they arrived at destination. It is quite true that the extent of such an alleged damage is largely determined from a consideration of such facts; but, in order that the defendant may protect itself from unjust claims, it is not essential that knowledge of all the facts should be possessed by some particular servant or servants in its employ. The facts concerning its alleged negligence of delay were as easily ascertained 24 days as 10 days after its commission. So was the condition of plaintiff's sheep when delivered to it. Whoever was possessed of knowledge of such fact knew it 24 days as well as 10 days after the sheep arrived at destination. Whatever was known by such persons, and whatever evidence was possessed by them of such fact, could have been ascertained by the defendant one time as well as another, at least until the matter became stale. The record of this case discloses that the sheep on their arrival were weighed at the stockyards, and the average weight of the different kinds of sheep ascertained. The record does not directly disclose the fact, but from the evidence in the case we think it a fair inference that there was kept a stockyard record of such weight. But, whether there was or not, the fact that the sheep were there weighed and the result thereof was as readily ascertained 24 as 10 days thereafter. Such facts, in the very nature of things, were not peculiarly within the knowledge of the plaintiff. They were equally well known to the persons about the stockyards who attended the weighing and the person or persons to whom the sheep were sold. The contention made that the giving of notice within 10 days was essential to enable the defendant to investigate and ascertain the facts, so it might properly have protected itself against an unjust claim, is more plausible than sound. No good reason appears why the defendant, with full knowledge of its negligent acts occasioning the delay, and with knowledge that the natural and probable consequences of such acts would result to plaintiff's damage, was not, equally with the plaintiff, afforded every opportunity to investigate and ascertain the nature and extent of the injury after the sheep arrived at destination and before they left the stockyards.

A further argument made in this connection is that, owing to the vast amount of business conducted by common carriers, and to the impracticability of immediate supervision over their numerous employees, and to the limited knowledge of the servants as to the nature and extent of injuries, such as here, it is but just that notice of claim should be given before rendering the carrier liable. This position is likewise untenable. It involves the violation of the well-recognized doctrine of "respondeat superior." If it shall be once said that the master shall not be liable, or held responsible, for the negligence or misconduct of his servants in

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the discharge of his business and within the scope of their employment, unless notified within a reasonable time, then are not only the fundamental principles upon which the law of common carriers is founded disregarded, but also one of the essential principles of the law of negligence relaxed? Another reason given by courts is expressed in the case of *The Westminster*, *supra*, where it is said: "The notice stipulated for is not of the fact of damage, more or less, but of the intent to hold the carrier liable for it, which, on failure to give notice, the latter, in view of the stipulation, may well regard as being waived." With due regard to the very high standing of that court, we submit that the giving of such a reason begs the question; for it assumes the validity of the contract, the very thing to be demonstrated. Undoubtedly, if the carrier may assume such validity, then it may well act upon the assumption that unless notice is given all claim for damages is waived. If the stipulation is invalid, then upon what theory may it be said that the carrier may regulate its conduct upon it? Another reason given is stated in *Kalina v. U. P. R. R. Co.*, 69 Kan. 172, 76 Pac. 438, as follows: "The clause in question is not one exempting the carrier from its common-law liability, or limiting that liability, but one imposing a condition upon the shipper, which he must observe before he may recover for a breach of the carrier's duty. In other words, it is a condition of recovery, and not an exemption from liability."

Such statements tend rather to confuse the proposition than to solve it. They consist of the making of one statement and denying it by asserting another, or the proving of a negative by an affirmative statement of its opposite. That there is a well-recognized distinction between a substantive right or liability, and remedy, though at times difficult of exact definition, is admitted. The assertion that the liability is not exempted nor limited, but the right of recovery is only conditioned, is not the making of such distinction; nor is the stipulation remedial, and not substantive, if such was intended to be declared. To say that a liability exists unrestricted, but that the remedial right shall be asserted within a prescribed time or under a certain procedure, is one thing. To say that a liability exists, but that no right of action or recovery shall exist until something else is done, is quite another and different thing. The one pertains merely to remedy; the other, to the cause of action itself. If a carrier's contract should expressly provide a liability, to the fullest extent imposed by law, for all torts committed by it, but should further provide that no recovery should be had for such wrongs, there would not be much difficulty in holding such a contract invalid, notwithstanding the argument that might be made that the contract did not affect liability, but only the right of recovery. The natural effect of such a contract would be to destroy or impair the sub-

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stantive right or liability itself. When it is said that the liability for negligence is not exempted, nor limited, but that there should be no right of recovery with respect to it, there is a substantial denial of the one statement by the making of another. When, also, it is said such liability is not limited, but the right of recovery with respect to it is made to depend upon some condition precedent, it is, in degree, doing the same thing. If there is no right of vindication, or restoration, or recovery for a liability, except upon some condition precedent, it naturally follows that the liability is to that extent limited or conditioned. The condition goes, not to the remedy merely, but to the cause of action itself. Until performance of the condition, no cause or right of action exists; and such is the obvious meaning of the plain terms of the stipulation under consideration.

We now come to the reasons given by other courts, and which are stated in Moore's work on Carriers (page 334), as follows: "They do not relieve carriers from any part of their obligation as common carriers. As such they are bound to the same diligence, fidelity, and care as they would be required to exercise if no such stipulation had been made." We find these expressions first used by Mr. Justice Strong in the Caldwell Case, where, as we have shown, they were used with respect to a stipulation pertaining to a loss or damage not alleged to have been caused by negligence, but where the carrier was sought to be held liable as an insurer. The expressions were made because the loss and damage sought to be recovered had not been incurred by the negligence of the carrier, and because the stipulation did not pertain to such a loss. We do not think Mr. Justice Strong intended that the language used by him should apply to a case of damage or injury incurred by the negligence of the carrier. He had no such case before him. But let us see whether such language can properly be applied to a case of negligence by the carrier. Why is it against the policy of the law to allow the carrier, by special contract, to exempt itself from, or limit its liability for, negligence? It is because of the fiduciary relation between the carrier and the shipper, the inequality of their positions, and the duties owing by the carrier to the public. To permit it to make such a contract tends to make it less careful and prompt in the performance of its duties and obligations, and less faithful in the discharge of its trust. Hence the policy of the law forbids such a contract. Now, is it true that a stipulation providing that the carrier shall not be liable for its negligence, whether ordinary, willful, or gross, except upon the presentation of a claim within a specified time, has no bearing or influence upon the exercise of its care and the discharge of its trust? The question is well answered by the statement that, the more stringent the motives are for the exercise of care and diligence, the greater is the proba-

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bility that the proper degree of care and diligence will be exercised; the less stringent the motives are, the less likelihood that such care will be exercised. It is readily perceived, in many instances, the motive for the exercise of a proper degree of care is not the same when the right of recovery is dependent upon some condition as when it is made absolute upon the infliction of the injury. The more conditions precedent of recovery which are imposed, the more difficult it is made on the part of the shipper to vindicate his right, and to recover for a loss or damage sustained by him. The more difficult it is made to vindicate the right, the less probable it is that it will be vindicated. Such matters have a natural tendency to influence the carrier in part to graduate its conduct, and to relax the degree of care and fidelity imposed upon it.

From a perusal of the cases we find no satisfactory reason for the conclusion that the stipulation in question does not affect the liability, nor influence the conduct of the carrier in the discharge of its duties, and is, therefore, not against the policy of the law. We are, however, mindful that the views expressed by us are against the great weight of modern authority. We find ourselves in the position where the conclusion reached by us upon what we believe to be fundamental principles is contrary to the conclusion reached by many able courts upon a consideration of the same principles. When we find such to be the case, we confess the confidence in our original position on this point is somewhat shaken. We have therefore come to the conclusion not to rule the case upon the principle so broadly declared in our original opinion. Our holding in this regard is that a stipulation, when fairly entered into and found to be reasonable under all the circumstances, requiring the presentation of a claim for loss or damage, is not in all cases against the policy of the law, and for that reason ineffectual, merely because the claim pertains to a loss or damage occasioned by negligence. It is not necessary to consider the question when such a stipulation will be regarded reasonable and applicable, nor the circumstances under which the shipper is relieved from the giving of notice or presentation of such a claim, because of the further view entertained by us as to the invalidity of the contract before us. As we have seen, under the general doctrine of this country, a contract which exempts the carrier from, or limits its liability for, negligence, contravenes public policy. When the contract in question is considered as a whole, is it not such a contract? Considering it in its entirety, what was the ruling intention of the parties, as evidenced by the plain language of its terms? Is it with respect to the presentation of a claim for damage of all kinds? Or is it with respect to an exemption from, or limitation of liability for, negligence? The alleged damages were found to have resulted

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from a negligent delay in transportation. In paragraphs 3 and 4 of the contract it is stipulated in most positive terms that the defendant should not be liable for any loss or damage which might be sustained from delay in transportation or shrinkage or for any other thing or cause not resulting from the defendant's willful or gross negligence. That such and all other stipulations in the contract exempting the defendant from liability for loss or damage, except for gross or willful negligence, are against the policy of the law, requires no discussion. Paragraph 5 relates to the question of presentation of claims for loss or damage or detention, not of all kinds for which the defendant in law would be liable, but for a liability of a loss or damage or detention stipulated about in the preceding paragraphs. We think the only fair meaning of the contract, and the ruling intention of the parties, as declared by its plain terms, are that the defendant should not, in any event, be liable for negligence or misconduct not amounting to gross or willful negligence, and that it should only be liable for gross or willful negligence upon the presentation of a claim. Paragraph 5 cannot be regarded as a separate and independent stipulation wholly unaffected by the obnoxious stipulations preceding it, and treated as merely dealing with the question of the presentation of claims for loss or damage of all kinds and for which the defendant, under the law, would be liable. It is directly related to and affected by the preceding paragraphs. Each is a part and parcel of a contract exempting the defendant from liability for ordinary negligence, and making it liable only for gross or willful negligence upon the presentation of a claim.

After the parties had in unmistakable terms stipulated that there should be no liability for negligence, except for gross or willful negligence, how can it be said that by paragraph 5 they intended to stipulate that there should be a liability for ordinary negligence and for all losses and damages for which the defendant in law is responsible, provided a claim is presented? If such were the intention of the parties, then the words employed by them in paragraphs 3 and 4 were entirely useless. The giving of such a meaning to paragraph 5 is antagonistic to every other provision of the contract. The meaning which we have given it is in harmony with all other provisions of the contract. If the carrier and shipper intend not to contract for an exemption from or a restriction of the former's liability for negligence or misconduct, but merely intend to restrict the latter's remedy by the imposing of a reasonable condition, it ought not to be a difficult matter to express such an intention in language which is certain and which fairly conveys such a meaning. The contract under consideration is not susceptible of such a construction. When the proposition is reduced to its simplest form, it presents the question: Is a contract which exempts a common carrier from

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liability for ordinary negligence, and which renders it liable alone for gross or willful negligence, and that only upon the presentation of a claim, forbidden by the policy of the law? We think it is, and so hold.

Upon this record such holding controls the case, and necessarily requires a reversal of the judgment. But these further observations might also be noted: Though the stipulation in paragraph 5 were to be regarded valid, can it be held applicable to the loss or damage sustained by plaintiff because of a change in the market? The cases seem to hold that stipulations similar in language as is the one here, requiring the presentation of a claim as a condition precedent of the carrier's liability, cannot be extended to a loss or damage occasioned by a fall of the market. The reasons for such a conclusion are that "agreements of this character are viewed with some strictness by the law, and unless the exemption from liability is clearly expressed it should not be allowed" (*Railway Co. v. Poole*, 73 Kan. 466, 87 Pac. 465), and that such a loss was not fairly contemplated by the parties and was not reasonably included within the terms of the stipulation. *Mo., K. & T. Ry. Co. v. Fry*, 74 Kan. 546, 87 Pac. 754; *Cornelius v. Atchison, etc., Ry. Co.*, 74 Kan. 599, 87 Pac. 751; *Atchison, etc., Ry. Co. v. Poole*, 73 Kan. 466, 87 Pac. 465; *Leonard v. C. & A. Ry. Co.*, 54 Mo. App. 293; *Kramer & Co. v. C., M. & St. P. Ry. Co.*, 101 Iowa, 178, 70 N. W. 119; 5 Am. & Eng. Ency. Law, 324.

The weight of authority also seems to be that, in an action where there is a plea of a special contract in defense limiting or conditioning the carrier's liability, the burden is upon the carrier, not only to show a valid special contract, but also to allege and prove facts and circumstances showing the stipulation to be reasonable. *Ft. W. & D. C. Ry. Co. v. Greathouse*, 82 Tex. 104, 17 S. W. 834; *Kan. & Ark. Valley R. Co. v. Ayers*, 63 Ark. 331, 38 S. W. 515; *Cox v. Cent. Vt. R. R.*, 170 Mass. 129, 49 N. E. 97; *Brooks & Sons v. West. Un. Tel. Co.*, 26 Utah, 147, 72 Pac. 499; *Westcott v. Fargo*, 61 N. Y. 542, 19 Am. Rep. 300; 6 Cyc. 507-519, and cases; 5 Am. & Eng. Ency. Law, 324-326, and cases; notes to cases, 10 A. & E. R. R. C. (N. S.) 864; notes to cases, 13 L. R. A. 518. In the case of *Railway Co. v. Greathouse*, supra, it was said: "Without determining whether this provision in a contract such as this can in any case be enforced, we do not think the appellant has brought itself within the rules laid down in those cases that permit such contracts to be enforced and that recognize their legality. When such provisions of a carrier's contract are enforced, it is upon the assumption that such agreement is reasonable, when considered in the light of the subject-matter of the contract and the circumstances and surroundings of the parties. To prove that such conditions in a

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contract are reasonable is a burden resting upon the carrier, who must show by proper pleadings and evidence the existence of facts that call for an enforcement of the condition. There were no pleadings and proof whatever upon this question coming from the carrier. *Railway v. Fagan*, 72 Tex. 132, 9 S. W. 749, 2 L. R. A. 75, 13 Am. St. Rep. 776; *Railway v. Harris*, 67 Tex. 167, 2 S. W. 574." And in *Galveston, H. & S. A. Ry. Co. v. Williams* (Tex. Civ. App.) 25 S. W. 1019, it was observed: "It is the answer that must allege such facts as will show that the contract was reasonable in its character."

The answer here contained no allegations, nor was there any proof upon the question, of the reasonableness of the stipulation. While the court found that the provision requiring the claim to be presented within 10 days after the unloading of the sheep and before they had been mingled with other sheep was a reasonable provision, yet such a finding was a mere conclusion of law, without even evidence in support of it. Conclusions of law cannot be made to perform the office of findings. *Dillon Imp. Co. v. Cleveland* (Utah) 88 Pac. 670. The question of reasonableness of such a stipulation is generally one of fact, and is dependent upon the particular facts and circumstances of the case. No facts are alleged, proven, or found from which the reasonableness of the stipulation may be deduced. The finding must be treated as no finding on the subject. The burden being cast upon the defendant to show the reasonableness of the special provision, until such fact is found in defendant's favor, the special contract, though otherwise valid and applicable, cannot avail it. The reasonableness of the provision cannot be determined from the face of the contract. It was well said by the Supreme Court of the state of Illinois: "We think no court could intelligently hold that such a provision [the giving of notice at destination to the station agent or some officer of the carrier before the stock is removed from the place of delivery and mingling with other stock] is in and of itself reasonable and valid, regardless of the facts and circumstances surrounding the parties to the contract." *Baxter v. Louisville R. Co.*, 165 Ill. 78, 45 N. E. 1003. The provision in that case was held unreasonable and invalid, because of the inference from the evidence that the carrier did not have a station agent or officer at the place of destination. To the same effect are *Engesether v. Gt. N. Ry. Co.*, 65 Minn. 168, 68 N. W. 4; *Carpenter v. Eastern Ry. Co.*, 67 Minn. 188, 69 N. W. 720.

So, too, it has been held that stipulations requiring the presentation of claims at a particular place and within a specified time are not applicable to cases where the nature of the injury or extent of loss cannot be reasonably ascertained within such time; nor to damages for delay in transportation; nor where the com-

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municated facts with respect to the loss or injury are as well or better understood by the carrier than the shipper. 6 Cyc. 508, 521, and cases; Popham v. Barnard, 77 Mo. App. 619; Smitha v. Louisville, etc., R. Co., 86 Tenn. 198, 6 S. W. 209. Such provisions have likewise been held unreasonable "if there is indefiniteness and uncertainty as to the agent to whom notice is to be given, or an agent is named to whom it would be impracticable to give notice, or if there is no agent reasonably accessible." 6 Cyc. 506, and cases cited.

These cases but illustrate the rule that what may be a reasonable requirement with respect to the presentation of a claim in one case may be unreasonable in another. There being no allegations nor proof of the reasonableness of the stipulation, the court, on that ground, erred in giving it effect.

For the foregoing reasons, the judgment of the court below is reversed, and the cause remanded for a new trial. Costs to appellant.

McCARTY, C. J., and FRICK, J., concur.

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(Court of Appeals of Kentucky, Dec. 5, 1907.)

[105 S. W. Rep. 961.]

Carriers—Injuries to Passengers—Foreign Cars—Defects—Duty of Carrier.*—Where a passenger was injured by the breaking of an axle on a foreign car being transported as part of a train, due to a sand hole in an axle, and there were tests known to car builders and iron moulders, by which such defects might be discovered before the materials were incorporated into the car, the manufacturer's negligent failure to make such tests would be imputed to the transporting carrier, under the rule that the carrier is liable for all defects in his vehicle existing at the time of construction, as well as those which may exist afterwards, and be discovered on investigation.

Same—Res Ipsa Loquitur.†—Where a passenger proved his injuries

*See extensive note, 3 R. R. R. 154, 26 Am. & Eng. R. Cas., N. S., 154; foot-notes appended to Kuhlen v. Boston & N. St. Ry. Co. (Mass.), 22 R. R. R. 785, 45 Am. & Eng. R. Cas., N. S., 785; foot-notes appended to Traphagen v. Erie R. Co. (N. J.), 22 R. R. R. 242, 45 Am. & Eng. R. Cas., N. S., 242.

†For the authorities in this series on the question whether a presumption of negligence on the part of the carrier arises from the fact that a passenger is injured, see foot-notes appended to Enos v. Rhode Island Suburban Ry. Co. (R. I.), 24 R. R. R. 612, 47 Am. & Eng. R. Cas., N. S., 612; foot-notes appended to Pennsylvania R. Co. v. McCaffrey (C. C. A.), 23 R. R. R. 23, 46 Am. & Eng. R. Cas., N. S., 23.

For the authorities in this series on the subject of the degree of

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as the result of a breakage in one of the cars of a train in which he was riding, the carrier, in order to defeat a recovery, must show, not only that it was due to a cause or causes which the exercise of the utmost human skill and foresight could not prevent, but that, if the accident was due to a latent defect in the material or construction of the car, it could not have been discovered either by the carrier or the builders by the exercise of such care.

Same—Mixed Trains.*—Carriers operating mixed trains for the carriage of passengers are under precisely the same duty as regards the safety of their cars from defects as where the passengers are carried only on passenger trains.

Trial—Requested Instruction—Conformity to Issues.—A charge in an action for injuries to a passenger from a broken axle, regarding the assumption of additional risk by plaintiff when riding on mixed trains, should not have been given where there was no question of the ordinary additional risk on mixed trains involved in the case.

Appeal from Circuit Court, Lewis County.

"To be officially reported."

Action by Mary J. Morgan against the Chesapeake & Ohio Railway Company and another. From a judgment for defendants, plaintiff appeals. Reversed and remanded.

Allan D. Cole, for appellant.

W. H. Wadsworth and *Le Wright Browning*, for appellees.

O'REAR, C. J. Appellee Chesapeake & Ohio Railway Company controls and operates a short branch line in Lewis and Carter counties, known as the "Kinniconick & Free Stone Railroad." It runs only mixed freight and passenger trains on the line. Appellant was a passenger on one of these trains. A loaded freight

care required of a carrier of passengers, see foot-note appended to *Forsythe v. Los Angeles Ry. Co.* (Cal.), 24 R. R. R. 447, 47 Am. & Eng. R. Cas., N. S., 447; foot-notes appended to *Chicago, etc., Ry. Co. v. Stibbs* (Okla.), 24 R. R. R. 427, 47 Am. & Eng. R. Cas., N. S., 427; *Marable v. Southern Ry. Co.* (N. Car.), 24 R. R. R. 418, 47 Am. & Eng. R. Cas., N. S., 418; foot-notes appended to *Indianapolis, etc., Co. v. Lawson* (C. C. A.), 24 R. R. R. 219, 47 Am. & Eng. R. Cas., N. S., 219; *Illinois Cent. R. Co. v. Johnson* (Ill.), 24 R. R. R. 213, 47 Am. & Eng. R. Cas., N. S., 213; *Mobile, L. & R. Co. v. Walsh* (Ala.), 24 R. R. R. 114, 27 Am. & Eng. R. Cas., N. S., 114; foot-notes appended to *MacFeat v. Philadelphia, etc., R. Co.* (Del. Sup'r Ct.), 24 R. R. R. 56, 47 Am. & Eng. R. Cas., N. S., 56; foot-note appended to *Chicago City Ry. Co. v. Shreve* (Ill.), 23 R. R. R. 444, 46 Am. & Eng. R. Cas., N. S., 444; foot-notes appended to *Farrell v. Great Northern Ry. Co.* (Minn.), 23 R. R. R. 408, 46 Am. & Eng. R. Cas., N. S., 408; foot-notes appended to *Louisville & N. R. Co. v. Mulder* (Ala.), 23 R. R. R. 66, 46 Am. & Eng. R. Cas., N. S., 66; foot-notes appended to *Atchison, etc., Ry. Co. v. Calhoun* (Okla.), 22 R. R. R. 791, 45 Am. & Eng. R. Cas., N. S., 791.

*See foot-note on preceding page.

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car of the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company, which was being hauled in this train was derailed by a broken axle, it is said, wrecking the passenger coach in which appellant was riding, inflicting injuries upon her which she claims were painful and impaired her power to earn money. The axle broke because of a latent fault, a sand hole, caused by the sand used in moulding the axle being accidentally taken into the molten metal. The spot occupied by the sand, if within the axle, is entirely undiscoverable by any kind of visual inspection, and in proportion to its area necessarily weakens the axle. If the derailment of the car in this instance was due to the circumstance of the defective axle, it illustrates just how dangerous such a defect may be. The question for decision on this point is: What was the extent of the carrier's duty with respect to a car forming part of a train on which it carried passengers?

The language usually employed in defining the measure of the carrier's duty is that "a common carrier of passengers is bound to provide for their safety so far as human care, skill, and foresight are capable of securing that end." But the question recurs, then: When is this duty discharged? Is a carrier which takes the car of another company into its passenger train excused from liability to its passenger resulting from hidden defects in such car when it shows that they were not discoverable by the ordinary methods of inspection available and practicable as to a car upon the tracks? *Pennsylvania Co. v. Roy*, 102 U. S. 451, 26 L. Ed. 141, was a case where a passenger had been injured by a defect in a Pullman car being hauled by the Pennsylvania Company in one of its trains. It sought to escape liability for the injury, upon the ground that it had no control over the car as to repairing it or keeping it in a safe condition, and particularly as to hidden defects in its construction. In the court's opinion, by Mr. Justice Harlan, it was said of the duty of the carrier: "These and many other adjudged cases, cited with approval in elementary treatises of acknowledged authority, show that the carrier is required as to passengers to observe the utmost caution characteristic of very careful, prudent men. He is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance, aided by the highest skill. And this caution and vigilance must necessarily be extended to all the agencies or means employed by the carrier in the transportation of the passenger. Among the duties resting upon him is the important one of providing cars or vehicles adequate; that is, sufficiently secure as to strength and other requisites for the safe conveyance of passengers. That duty the law enforces with great strictness. For the slightest negligence or fault in this regard, from which injury results to the passenger, the carrier is liable

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in damages. These doctrines to which the courts, with few exceptions, have given a firm and steady support, and which it is neither wise nor just to disturb or question, would, however, lose much, if not all, of their practical value, if carriers are permitted to escape responsibility upon the ground that the cars or vehicles used by them, and from whose insufficiency injury has resulted to the passenger, belong to others. * * * The law will not permit a railroad company, engaged in the business of carrying persons for hire, through any device or arrangement with a sleeping car company whose cars are used by the railroad company, and constitute a part of its train, to evade the duty of providing proper means for the safe conveyance of those whom it has agreed to convey." There is a very common custom of interchanging cars among railroads. The passenger has no option but to use the vehicles and the trains provided by the carrier for the transportation of the public. The railroad company may cause inspection to be made before putting the cars of another company into its trains, and, if it fails to do so, it will not be heard to say that the owner company was the one in fault in letting its car get into an unsafe condition. But here the defect in the visiting railway car was not observable by ordinary or even by extraordinary inspection after it came into appellee's custody. What, then, is the rule? We think that a carrier of passengers is answerable in no less degree for the safe condition of the cars of other companies which it is using than for its own cars. Its duty to its passengers cannot be made to shift upon any such consideration, becoming lighter when the carrier employs other vehicles for its service than its own. It ought to be held, and will be held, to the same degree of care as to all cars and locomotives in its train, whether it owns them or not.

The suggestion is made that under the Constitution and laws of this state carriers are bound to take the cars of connecting lines, and to haul them on equal terms with its own cars; and that as it has not the opportunity for other tests or examination than the conditions afford—the car standing upon the track—it ought not to be held accountable for not discovering defects that were not discoverable by such methods of examination. This would impose on the carrier, as we shall see further along, less responsibility as to such cars than the law imposes as to the carrier's own cars. Such a rule is not consistent with that exacting standard which the law out of its tender regard for human life has erected for the protection of the traveling public. As intimated in *Pennsylvania Co. v. Roy*, *supra*, the owner of the defective car might and doubtless would be liable to reimburse the carrier who was compelled to respond in damages to its passenger injured because of such defects. At any rate, as between the three, the passenger, the carrier, and the owner of the car,

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the passenger's safety and the carrier's supreme duty are the matters of main concern to the law. The tendency is to exact more care, and not less, of carriers of passengers.

Hegeman v. Western R. Corp., 13 N. Y. 9, 64 Am. Dec. 517, was decided more than 50 years ago in the Court of Appeals of New York. There a passenger was injured by the car in which he was seated being wrecked through a defect in the axle. The company showed that it purchased the car from manufacturers in good repute, that it had been periodically inspected, and that it always appeared sound. The charge to the jury upon the trial was that although the defect was latent, and could not be discovered by the most vigilant external examination, yet, if it could be ascertained by a known test, applied either by the manufacturer or the defendant, the latter was liable. The court held there was no error in the instruction. It was there said: "It was said that carriers of passengers are not insurers. This is true. That they were not required to become smelters of iron, or manufacturers of cars in the prosecution of their business. This also must be conceded. What the law does require is that they shall furnish a sufficient car to secure the safety of their passengers by the exercise of the 'utmost care and skill in its preparation.' They may construct it themselves, or avail themselves of the services of others; but in either case they engage that all well-directed skill can do has been done for the accomplishment of this object. A good reputation upon the part of the builder is very well in itself, but ought not to be accepted by the public, or the law, as a substitute for a good vehicle. What is demanded, and what is undertaken by the corporation, is not merely that the manufacturer had the requisite capacity, but that it was skillfully exercised in the particular instance." In *Sharp v. Gray*, 9 Bing. 457, the carrier was held responsible for all defects in his vehicle which can be seen at the time of construction, as well as for such as may exist afterward, and be discovered on investigation. If not, he might buy ill constructed or unsafe vehicles, and his passengers be without remedy. The same doctrine was approved in a carefully prepared opinion in *Treadwell v. Whittier*, 80 Cal. 575, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175. And such we think must be the rule. The carrier, in consideration of certain well-known and highly valuable rights granted to it by the public, undertakes certain duties toward the public, among them being to provide itself with suitable and safe cars and vehicles in which to carry the traveling public. There is no such duty on the manufacturer of the cars. There is no reciprocal legal relation between him and the public in this respect. When the carrier elects to have another build its cars, it ought not to be absolved by that fact from its duty to the public to furnish safe cars. The carrier cannot lessen its responsibility

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by shifting its undertaking to another's shoulders. Its duty to furnish safe cars is side by side with its duty to furnish a safe track, and to operate them in a safe manner. None of its duties in these respects can be sublet so as to relieve it from the full measure primarily exacted of it by law. The carrier selects the manufacturer of its cars, if it does not itself construct them, precisely as it does those who grade its road, and lay its tracks, and operate its trains. That it does not exercise control over the former is because it elects to place that matter in the hands of the manufacturer, instead of retaining the supervising control itself. The manufacturer should be deemed the agent of the carrier as respects its duty to select the material out of which its cars and locomotives are built, as well as in inspecting each step of their construction. If there be tests known to the crafts of car builders, or iron molders, by which such defects might be discovered before the part was incorporated into the car, then the failure of the manufacturer to make the test will be deemed a failure by the carrier to make it. This is not a vicarious responsibility. It extends, as the necessity of this business demands, the rule of respondeat superior to a situation which falls clearly within its scope and spirit. Where an injury is inflicted upon a passenger by the breaking or wrecking of a part of the train on which he is riding, it is presumably the result of negligence at some point by the carrier. As stated by Judge Story, in *Story on Bailments*, § 601a: "When injury or damage happens to the passengers by the breaking down or overturning of the coach, or by any other accident occurring on the ground, the presumption *prima facie* is that it occurred by the negligence of the coachman, and the onus probandi is on the proprietors of the coach to establish that there has been no negligence whatever, and that the damage or injury has been occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent; for the law will, in tenderness to human life and limb, hold the proprietors liable for the slightest negligence, and will compel them to repel by satisfactory proofs every imputation thereof." When the passenger has proved his injury as the result of a breakage in the car or the wrecking of the train on which he was being carried, whether the defect was in the particular car in which he was riding or not, the burden is then cast upon the carrier to show that it was due to a cause or causes which the exercise of the utmost human skill and foresight could not prevent. And the carrier in this connection must show, if the accident was due to a latent defect in the material or construction of the car, that not only could it not have discovered the defect by the exercise of such care, but that the builders could not by the exercise of the same care have discovered the defect or foreseen the result. This rule applies the same whether the defective car belonged to the carrier or not.

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Able counsel for appellee contend that the rule in this state does not extend so far as is written above. No case has heretofore arisen in this state where the question was involved either as to the carrier's responsibility for the condition of cars not its own which it hauls in its trains, or as to defects occurring in the course of the manufacture of the cars constituting its trains. Nevertheless we will examine in this opinion the authorities relied upon by appellee. *Kentucky Central R. R. Co. v. Thomas*, 79 Ky. 160, 42 Am. Rep. 208, is cited. There the question was as to the duty of a railroad company, a common carrier, to equip its cars with Westinghouse air brakes. At this day, less than 30 years after that case was decided, it may seem strange that a carrier of passengers was resisting the installment of that now indispensable appliance to railroad trains which has proved so valuable to both the carriers and the public. Yet in that case the plaintiff offered evidence conducing to prove that the Westinghouse air brake was more efficient in arresting the progress of a train than the brakes in use on the defendant's train on which the intestate was killed. The defendant objected to the evidence, and it being admitted over its exceptions, that was assigned as error. Respecting the duty of railway carriers, the court laid down this rule, which we understand to be the same, differently expressed, as is restated in principle in this opinion: "They are bound to provide a road, engines, and cars free from all defects which endanger the lives of passengers, and which might have been discovered by the closest and most careful scrutiny of competent men, and to employ competent and trustworthy persons to operate and manage their roads, engines, and cars, but are not liable for casualties which human sagacity cannot foresee, and against which the utmost prudence cannot guard." *Louisville Railway Co. v. Weams*, 80 Ky. 420, involved the degree of care required of a driver of a mule car on a street railway. And it was there stated: "The rule is that a carrier of passengers for hire must use the utmost care and skill which prudent men are accustomed to use under like circumstances." The instruction condemned in that case was this: "The defendant as a carrier of passengers for hire was bound, as far as human foresight and care would enable it, to carry the plaintiff with safety," etc. But this court in *Davis v. Paducah Light & Ry. Co.*, 113 Ky. 267, 68 S. W. 140, extended the rule laid down in the *Weams* Case, *supra*. The instruction then under consideration read: "* * * It was the duty of the defendant company to have provided safe cars in a safe condition in which for passengers to ride in so far as human foresight and judgment by recent inspection could enable the company to know, or in good faith to believe, the cars in good condition by being inspected by a competent employee." The court refused to approve a substitution

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of good faith for a safe car. Instead, Shearman & Redfield's Negligence, § 495, was cited with approval, that there was exacted from a common carrier for hire the utmost care and skill which prudent men are accustomed to use under similar circumstances. In that case the builder's negligence was not involved. The car had been allowed to fall into disrepair. In *Louisville Ry. Co. v. Hartledge*, 74 S. W. 742, 25 Ky. Law Rep. 152, also cited by appellee, the cause of the inquiry was not, so far as appears, in the condition of the car, but was some obstruction on the track. The court refused to reverse the judgment below, and did not undertake to define the full duty of the carrier to its passengers as to furnishing them safe cars in which to ride.

Finally, a question was made and submitted to the jury, respecting the assumption of additional risks by appellant in riding upon a mixed train. We do not think there was any place in this case for such an instruction. Carriers who operate mixed trains for carrying passengers are under precisely the same duty as regards the safety of their cars from defects as where they carry the passengers upon passenger trains. In *Illinois Central v. Vinson*, 74 S. W. 671, 25 Ky. Law Rep. 38, and *C. & O. Ry. Co. v. Jordan*, 76 S. W. 146, 25 Ky. Law Rep. 574, the instructions were predicated upon the evidence as to sudden jerkings of the trains, and in such cases there is an assumption by the passenger of such usual jerkings and jolts as are necessary and customary in starting and stopping prudently operated mixed trains; but no claim is made in this case for injury based upon such cause. The instruction should have been omitted.

The pleadings sufficiently present the questions discussed.

For the reasons given, the judgment is reversed, and cause remanded for a new trial under proceedings consistent herewith.

LEWIS v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina, Aug. 31, 1907.)

[58 S. E. Rep. 989.]

Appeal—Reversal—Rejection of Evidence—Grounds of Decision—Void Statute.*—A judgment of the circuit court affirming a judgment of a magistrate, based on 24 St. at Large, p. 1, rendering a connecting carrier liable for damages to freight suffered while on the line of another carrier, will be reversed; such act having been held a violation of the interstate commerce clause of the federal Constitution.

Appeal from Common Pleas Circuit Court of Clarendon County.

Action by W. M. Lewis against the Atlantic Coast Line Railroad Company. From an order of the circuit court affirming a judgment of a magistrate, defendant appeals. Reversed.

P. A. Willcox, Henry E. Davis, and Wilson & Du Rant, for appellant.

W. C. Davis, for respondent.

WOODS, J. In July, 1904, Nordyke & Marmon Company delivered to the Cleveland, Cincinnati, Chicago & St. Louis Railroad Company, at Indianapolis, Ind., a corn mill, standard shoe and hopper, box iron castings, crated iron gear wheel, crated iron shaft, consigned to the plaintiff at Alcolu, S. C. The goods reached the defendant over the Atlantic Coast Line Railroad, the terminal carrier, in a damaged condition. Thereafter plaintiff brought this action in a magistrate's court against the terminal company for \$11 damages and the statutory penalty of \$50 for failure to adjust and pay the claim within 90 days. The judgment of the magistrate for the entire amount claimed was affirmed by the circuit court.

The complaint alleges a contract of through carriage with the Cleveland, Cincinnati, Chicago & St. Louis Railroad, by which

*For the authorities in this series on the subject of state regulations which may interfere with interstate commerce, see foot-notes appended to *Atlantic Coast Line Ry. Co. v. Commonwealth* (Va.), 10 R. R. R. 399, 34 Am. & Eng. R. Cas., N. S., 399, where all those preceding it are collected; foot-notes appended to *State v. Cumberland & P. R. Co.* (Md.), 25 R. R. R. 122, 48 Am. & Eng. R. Cas., N. S., 122; foot-notes appended to *Shipper v. Seaboard Air Line Ry.* (S. Car.), 24 R. R. R. 306, 47 Am. & Eng. R. Cas., N. S., 306; foot-notes appended to *McNeill v. Southern Ry. Co.* (U. S.), 24 R. R. R. 285, 47 Am. & Eng. R. Cas., N. S., 285; foot-notes appended to *Houston & Tex. Cent. R. Co. v. Mayes* (U. S.), 24 R. R. R. 50, 47 Am. & Eng. R. Cas., N. S., 50; *Harrill Bros. v. Southern Ry.* (N. Car.), 23 R. R. R. 427, 46 Am. & Eng. R. Cas., N. S., 427.

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it undertook for itself and its connecting lines, including the defendant, to transport the goods to destination; and it further alleges that all the connecting carriers received the goods and recognized, acquiesced in, and acted on the contract for through carriage. The plaintiff proved the goods were damaged when received. The bill of lading was introduced in evidence, but does not appear in the record. To rebut the presumption of damage by the terminal carrier, the defendant's receiving clerk testified the goods came into the possession of the defendant from the Chesapeake & Ohio Railroad Company at Richmond, Va., in a damaged condition. The credibility of this evidence was for the magistrate and circuit judge to pass on, and, if the record disclosed this evidence had been rejected on any reasonable ground, the judgment would be affirmed, because this court could not disturb the finding of fact that the presumption of damage by the terminal carrier had not been rebutted by credible testimony. The record makes it clear, however, the cause was not decided on this ground, but on the statute of May, 1903 (24 St. at Large, p. 1), under which the defendant, as one of the connecting carriers, would be liable without respect to whether the damage to the goods occurred on its own line or on that of another carrier. If the act of 1903 is a valid statute, the evidence that the property was damaged on another line would be immaterial, and the circuit court no doubt so regarded it in holding the statute constitutional.

This case was heard in connection with *Venning v. Atlantic Coast Line Railway*, 58 S. E. 983, and the decision in that case disposes of all the questions arising in this.

The judgment of this court is that the judgment of the circuit court be reversed, and the case remanded to the magistrate's court for a new trial.

STATE *ex rel.* WINNETT *et al.* v. UNION STOCK YARDS CO. OF OMAHA, Limited.

(Supreme Court of Nebraska, March 5, 1908.)

[115 N. W. Rep. 627.]

Carriers—Who Are Common Carriers—Stock Yards Company.*—

A stock yards company has about 35 miles of railway track, including what is known as a "transfer track," constructed upon its own premises. Several private industries are conducted adjacent to the premises of the company. The transfer track connects with the track of several railway lines running to the city where the stock yards are located. The stock yards company is engaged in the carrying of freight in car load lots. Cars billed to the stock yards, or to the industries adjacent thereto, are placed on the transfer track by the railway company over whose line the car is shipped, and from there are hauled by the stock yards company with its own engines to the pens or sheds in the yards or to the industries which are to receive the freight. Outgoing cars are hauled by the stock yards company to the transfer track where they are received by the railway company. The railway companies for whom such service is rendered are charged \$1 per car therefor. It does not deal with the general public, but only with the railway companies whose lines connect with the transfer line and with the industries located upon the margin of its premises, and with the consignees and consignors of live stock who receive shipments or load shipments in its yards. It transports freight in cars over its own tracks from one industry upon its lines to another. It is not engaged in the production of commodities. Its vocation is purely one of service to others, and with the exception of feeding live stock in transit the service rendered is the transportation of freight. Held, that such stock yards company is a common carrier within the meaning of the constitutional amendment adopted at the general election in 1906 and chapter 90, p. 311, of the Laws of 1907.

Same.—Section 4, c. 90, p. 320, Laws 1907, provides in part: "The term 'common carriers' as used herein shall be taken to include all corporations, companies, individuals and association of individuals, their lessees, or receivers (appointed by any court whatsoever) that may now or hereafter own, operate, manage or control any railroad,

*For the authorities in this series on the question who are, and are not, common carriers, see foot-notes appended to *Carpenter v. Baltimore & O. Ry. Co.* (Del. Sup'r Ct.), 20 R. R. R. 679, 43 Am. & Eng. R. Cas., N. S., 679; *Baker v. Boston & M. R. Co.* (N. H.), 23 R. R. R. 592, 46 Am. & Eng. R. Cas., N. S., 592; extensive note, 23 R. R. R. 176, 46 Am. & Eng. R. Cas., N. S., 176.

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interurban or street railway line, * * * or any express company, car company, sleeping car company, freight and freight line company, telegraph and telephone companies and any other carrier engaged in the transmission of messages or transportation of passengers or freight for hire." Held, that the phrase "any other carrier engaged in the transmission of messages or transportation of passengers or freight for hire" means only such companies as by their public profession hold themselves out to the world as engaged in the vocation of transmitting messages, or transporting passengers or freight for hire, and as willing to perform such services for any person who may have occasion to employ them.

Same—"Common Carrier."—Any person or corporation holding itself out to the public as offering its services to all persons similarly situated, and performing as its public vocation the services of transporting passengers, freight, or intelligence, is a common carrier in the particular spheres of such employment.

(Syllabus by the Court.)

Original petition for mandamus by the state, on relation of Hudson J. Winnett and others constituting the Nebraska State Railway Commission, to compel the Union Stock Yards Company of Omaha, Limited, to file with relators all freight schedules, classifications, etc., used by the stock yards company, as required by Comp. St. 1907, c. 72, art. 8, § 5. Peremptory writ issued.

W. T. Thompson, for relators.

Frank T. Ransom, for respondent.

EPPERSON, C. In their petition relators allege, among other things, that the respondent is a corporation and a common carrier; that it is the duty of respondent, pursuant to section 5, art. 8, c. 72, Comp. St. 1907, to file with relators within 30 days after the 27th day of March, 1907, all freight schedules, classifications, rates, tariffs, and charges used by respondent, and in effect January 1, 1907; and that respondent refuses so to do, though often requested by relators. Relators pray for a writ of mandamus requiring respondent forthwith to file such schedule with relators as the Nebraska State Railway Commission. Respondent answered, setting forth at length the nature of its business; admitted that it was a corporation, but denied that it was a common carrier.

The following facts are either admitted by the pleadings or established by the evidence: The respondent is a corporation duly organized and existing under and by virtue of the laws of the state of Nebraska, and among other provisions of its articles of incorporation is the following: "The general nature of the business to be transacted by said corporation shall be the pur-

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chase and sale, the feeding and caring for, slaughtering, dressing, packing and holding for sale, selling, and selling for others, of live stock, including cattle, hogs, sheep, and horses, and shipping by refrigerator cars or otherwise of meats and products thereof, and doing generally the business of a stockyard, and whatever is incident or any wise related to or usually connected therewith. And in furtherance of the said business of the said company to guarantee the obligations of other corporations and of other parties and to apply its funds to the purchase and payment of stocks and bonds or either stocks or bonds of other corporations. It shall be competent for said corporation to construct, maintain, and operate a railroad, with tracks of other railroad companies, which shall be operated for the purposes of its business as above set forth, as well, also, of carrying passengers and freight for the general public. The termini of said road shall be the city of Omaha in county of Douglas, and a point on the south line of said county not further west of the Missouri river than fifteen miles, and the amount of capital stock necessary to construct such road is (\$300,000) three hundred thousand dollars." Respondent, however, has never been engaged in the packing business, or shipping any commodities of its own production, nor has it ever been engaged in passenger traffic. It owns a large tract of land in South Omaha upon which it has constructed buildings, sheds, and pens for receiving and caring for live stock, and has upon its premises about 35 miles of railroad tracks. There are located on the margin of respondent's premises five slaughtering and packing houses owned by different corporations where live stock is slaughtered and the products packed for shipment. There are also located on its premises a lumber company, a grain elevator, and a cooperage company's plant, and other industries. Respondent has railroad tracks upon its premises leading to said sheds and pens and to the said several industries located on its tracks, and these tracks connect with a transfer track, which connects with the tracks of several railroad companies engaged in interstate and state traffic. Cars loaded with live stock and other freight are transferred into respondent's premises, and to the pens, sheds, and buildings thereon, and to the several industries by means of said transfer track and the other tracks upon respondent's premises. Cars going into respondent's premises are placed by the railroad company desiring them carried in on the transfer track, this track being located on respondent's premises. And respondent there receives the cars, and takes them by means of its locomotives and engines to the point of destination in respondent's premises. Cars destined out of respondent's premises are carried by it over its tracks by means of its said locomotives to the transfer track, where the railroad company over whose lines they are to be carried receives

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them and hauls them away. Empty cars are delivered by the several railroad companies upon the transfer track, and these are hauled by respondent in this manner either to the pens, sheds, buildings, or industries on respondent's premises, as directed by the company setting the cars on the transfer track. Respondent owns 3 flat cars used only upon its own premises for picking up refuse in and about the yards and for hauling cinders from the packing plants into respondent's premises. It owns 11 engines which it uses in its business. It has constructed no railroad tracks except those upon its own premises other than one track across the streets, authority for which was given by ordinance. Respondent has no station on its premises other than where live stock is unloaded and loaded into cars and at the industries mentioned above. At all these stations, and at the industries, the freight is received into cars owned by the railroad companies. Live stock received into or going out of the yards is unloaded and loaded by respondent, and freight received or shipped from the industries is unloaded or loaded by the plants. Respondent has never exercised the power of eminent domain. Respondent, in the manner aforesaid, handles all cars requested by the common carriers to be handled by it where the tracks of the requesting common carrier reaches the transfer track, for which service respondent receives compensation from the railroad companies as provided in a circular of charges based upon a written contract between respondent and some of the railroad companies. The same charges are made other companies not signing the contract. Respondent has no tracks for unloading and loading freight from wagons into cars or from cars into wagons, or any place for the general public to receive or load freight for shipment. Where the owner of live stock in the yards desires to ship same out of the yards, respondent procures the necessary cars from the railroad company over whose lines the stock is to be shipped, loads them, and delivers the same to the railroad company upon the transfer track. The manner of receiving live stock destined to points in the yards is for the railroad company to deliver to respondent a waybill and to set cars upon the transfer track. This waybill shows the point of origin of the shipment and point of destination. Respondent takes the cars into its premises and unloads them to the consignee. Respondent collects all of the freight charges due to railroad companies on incoming live stock when not prepaid, and pays the same over weekly to the railroad companies, but collects no freight charges on outgoing freight nor on incoming dead freight. When requested, respondent transfers cars from one railroad company to another. The railroad companies are not authorized to issue any bill of lading for respondent for any shipment incoming or outgoing from its premises, nor does respondent issue any bills of

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lading on its own behalf, or on behalf of any railroad company connected with its tracks, nor does it fix rates for the connecting companies. Live stock consigned to points inside of the yards is generally consigned to a commission agent to whom it is delivered by respondent. The live stock agent sells the shipment for the owner, and if the freight charges have not been prepaid, the commission man pays the charges to respondent, who pays it over weekly to the railroad companies. Respondent does not receive any freight from the railroad companies except cars loaded with freight or empty cars. The average daily receipts during the year are about 625 cars received in, which would make a movement of 1,250 cars in and out daily. There are 152 chutes on respondent's premises where live stock is loaded and unloaded. Respondent has never filed any plat of the route of the track that has been built on its premises nor of any intended to be built, and has never made a report to the Secretary of State in conformity with section 1, art. 11, of the Constitution, nor as required by section 88, c. 16, Comp. St. 1907. Respondent's property is assessed by the local assessor for taxation, and is not assessed by the State Board of Equalization. It might further be said that respondent also hauls cars from one industry to another in their interchange of business, and receives compensation therefor from the industry receiving the service. A fee is paid by the railroad companies for respondent's services in taking loaded cars to and from the industries and from the transfer tracks and stock yards, the amount being the same (\$1 per car) and does not depend upon the distance hauled nor the amount of freight contained in the cars. From time to time the respondent changed its articles of incorporation, and on one occasion by a resolution, duly made and passed, the proper officers were directed to certify the adoption of an amendment according to the requirements of the general railroad laws of this state, thereby indicating its intention at that time to operate under our railroad laws. Respondent has never, however, taken advantage of its charter right to operate a railroad devoted to a general freight and passenger traffic, and its tracks have not been extended beyond the limits of its own property.

Summarizing this statement of facts we find the following, which we consider control this case: Respondent is authorized by its charter to construct and operate a railroad for the purpose of carrying freight for the general public. It has constructed railroad tracks connecting with the tracks of other carriers and connecting also with a large number of industries whose plants are established upon the margin of respondent's property. It is engaged in the carrying of freight which the public consigns in car load lots, or which the connecting carrier assembles in car load lots, to the several industries upon its tracks, and to the

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commission men who receive consignments of live stock in the yards of the respondent. It carries like shipments for the shippers of live stock from its yards, and also from the industries located upon the margin of its land, and delivers the same to the several connecting carriers. It transports freight from one of the aforesaid industries to another. It is not engaged in the production of commodities. Its vocation is purely one of service to others. With the exception of feeding live stock in transit, the service rendered is the carrying of freight. For the service thus rendered it receives a compensation.

At the general election in 1906 there was adopted an amendment to our Constitution which is as follows: "There shall be a State Railway Commission, consisting of three members, who shall be first elected at the general election in 1906, whose term of office, except those chosen at the first election under this provision, shall be six years, and whose compensation shall be fixed by the Legislature. Of the three commissioners first elected, the one receiving the highest number of votes, shall hold his office for six years, the next highest four years, and the lowest two years. The powers and duties of such Commission shall include regulation of rates, service and general control of common carriers as the Legislature may provide by law. But in the absence of specific legislation, the Commission shall exercise the powers and perform the duties enumerated in this provision."

By an act of the Legislature, appearing as chapter 90, p. 311, of the Laws of 1907, the Legislature prescribed the powers, duties, and qualifications of the State Railway Commission. Section 4 is in part as follows: "The term common carriers as used herein shall be taken to include all corporations, companies, individuals and association of individuals, their lessees, or receivers (appointed by any court whatsoever) that may now or hereafter own, operate, manage or control any railroad, interurban or street railway line, operated either by steam or electricity or any other motive power, or part thereof, or any express company, car company, sleeping car company, freight and freight line company, telegraph and telephone companies and any other carrier engaged in the transmission of messages or transportation of passengers or freight for hire."

The question presented for determination, stated generally, is this: Is the respondent a common carrier within the meaning of the constitutional amendment and the act of the Legislature of 1907? Respondent contends that it is not a common carrier within the common-law definition of that term, that the common carriers of the constitutional amendment are such carriers only as would be declared common carriers by the common law, and that the definition prescribed by the Legislature is an unwarranted expansion of the meaning of the term. At the threshold

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of this case, therefore, we are met with the inquiry, is the definition of "common carrier" in the act of the Legislature an enlargement of the meaning of those words which will prohibit the application of the act to a class of agencies not strictly within the common-law classification of common carriers?

There are but two carriers known in law—private carriers and common carriers. A private carrier undertakes to deliver particular goods at a particular place. He is not bound in law to undertake such transportation. When opportunity for such employment is presented, he may reject it or avail himself of it as he sees fit. He enters into a contract applicable to and binding him only as to the particular undertaking. He does not hold himself out to the public as a carrier. Strictly speaking, at common law, so far as its vocation is concerned, a common carrier is one which holds itself out to the public as a carrier always open to employment for the transportation of persons or freight, and that it will carry for all persons indiscriminately. A common carrier undertakes to convey freight from one place to another, and it makes no difference whether the distance be long or short. It is not necessary to make of itself a common carrier that it should hold itself out as ready to transport freight from any place to any other place; but the transportation may be confined from one point upon the line it operates to another point upon its line, or upon the line of a connecting carrier. By the present general adoption and use of the term "common carrier" it is not necessarily limited to one which holds itself out to carry any and all kinds of freight, but it applies with equal force to any company whose vocation is of a public nature, although limited to the transportation of certain classes or kinds of freight, and it may be of service to a limited few who by their peculiar situation or business may have occasion to employ it. With the development of commerce and increased facilities for the transportation of passengers, freight, and intelligence the meaning of the words "common carrier" has correspondingly changed, not alone by technical and arbitrary legislative enactment but by reasonable, necessary, and general adoption, so that now it means not only the stage coach and canal boat, but railway, street railway, and express companies—yes, telegraph and telephone companies. It appears that, in addition to operating the tracks within the boundaries of its own private property, the respondent receives from connecting railway companies, and delivers to the various packing plants and industries adjacent to its property freight cars for the transportation of live stock and merchandise. It accepts from connecting carriers loaded or empty cars, and delivers the same to the several industries or to the consignee of live stock or to the shipper of live stock from its yards irrespective of persons, and for these purposes it must be considered

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as forming a component part of the system of railway transportation carried on by the connecting lines, and to this extent it is equally subject to the duties and obligations of a common carrier. We think there can be no doubt but that the respondent can be required to extend equal privileges to any person who may establish an industry for the production of commodities for shipment upon the margin of its grounds, that it could be compelled, if necessary, to furnish to any person who might desire to ship live stock under like conditions the same facilities that it now furnishes to its present patrons. We think there can be no doubt but that a railroad company, building its tracks to the transfer line of the respondent, could demand and receive the same facilities for the delivery of live stock to commission men at South Omaha and to the several industries adjacent to respondent's property as is now given to the present connecting railroads. As to such person the respondent must be considered a common carrier, even though it transacts only a small part of the business transacted by such common carriers as are doing a general business; or, in other words, it is a common carrier in the special line to which it has devoted its energies, although not a common carrier for all purposes.

Respondent does not produce commodities. Its business is strictly one of service to others. Its scope is one of magnitude, handling, as the evidence shows, 1,250 cars per day, or 456,250 during the year. Its vocation is the transportation of freight over its own lines. It holds itself out to the public as ready and willing to transport all freight for those who have occasion to employ it for the purpose for which it exists, and receives compensation therefor. The statute, we think, has reference to all companies or persons who hold themselves out to the public as engaged in those things which characterize it as a common carrier. It has been said that a common carrier is one who holds itself "out as ready 'to carry at reasonable rates such commodities as are in his line of business for all persons who offer them, as nearly as his means will allow.'" *Faucher v. Wilson*, 68 N. H. 338, 38 Atl. 1002, 39 L. R. A. 431, and cases cited. In the case at bar, respondent holds itself out as a carrier of certain classes of freight, namely: such as is tendered it in car load lots. That is its line of business. It is a common carrier within the meaning of section 4, c. 90, p. 320, Sess. Laws 1907, and the constitutional amendment.

In *Missouri P. R. Co. v. Wichita Wholesale Grocery Co.*, 55 Kan. 525, 40 Pac. 899, it was held: "A railroad company taking loaded cars from its connection with another railroad, and transferring them by means of a switch engine, over a portion of its own track, to a spur of its own, and receiving its compensation from the connecting road, acts as a common carrier, and is lia-

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ble as such for the safety of the goods transported, no matter how short the distance from the place of receipt to that of delivery." In opinion we find the following: "All railway corporations are by statute made common carriers, and required to transport persons and property, as such, for all persons alike. Gen. St. 1889, par. 1212. The distance over which freight is hauled, whether in car load lots or in less quantities, whether in its own cars or those belonging to connecting carriers, can make no difference with the capacity in which the company acts. A railroad transporting a passenger or a car load of freight one mile, using a switch engine for motive power, is just as much a common carrier as if the distance were a thousand miles by regular freight or passenger train." See, also, opinion in U. S. v. Union Stock Yards Co., 158 Fed. — (T. C. Munger, J.).

The bulk of respondent's business comes from the railroads running into South Omaha. These railroad companies are not producers of the goods, wares, merchandise, and live stock delivered to respondent for transportation or delivery. Such freight consists of commodities consigned by the public to the industries upon the respondent's tracks, or to commission men, receiving live stock at the respondent's yards. Though the respondent receives such employment from the railroad companies and looks to them for its compensation, yet its service is to the public, to the same extent as were the services rendered by the connecting railroads in their transportation of the same freight. It holds itself out as ready and willing to transport such freight to the several industries and to the stock yards for all railroads entering South Omaha. Its employment is not limited to a certain few, but extends to all railroads. It is continually at work, daily transacting business of importance to the commercial world. It is the center of a vast transportation or commercial business, to complete which its duties as a carrier are constantly invoked. Respondent admits that it is subject to legislative control, and that its rates may be regulated by statute. We think that this is true, and that it is true because respondent is a common carrier. If it is not such, then it is a private carrier, and the Legislature would have nothing whatever to say about its rates. The statute above quoted clearly defines a common carrier, and, under its provisions, any one engaged in the transportation of freight for hire is declared to be a common carrier. This, however, must be construed to mean any person whose public profession is the transportation of goods, and who is not at liberty to reject the carrying of such freight as he has held himself out to the world as willing to convey. With this construction of the statute we find that it is not an unwarranted enlargement of the common-law meaning of "common carriers," as that meaning has grown to designate the improved agencies

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of commerce, according to its general adoption and use, nor has the legislative provision exceeded the authority of the Constitution in declaring what shall be considered common carriers.

Respondent contends that it is but a switching company; that because its charges for services rendered are made as a switching fee, and not based upon the weight or value of the freight, or upon the distance hauled, it cannot be classed as a common carrier. *Kentucky & Indiana Bridge Company v. Louisville & Nashville Ry. Co. (C. C.)* 37 Fed. 567, 2 L. R. A. 289, is cited by respondent. It was there held: "Where a corporation which is under no legal obligation to do so voluntarily contracts to switch cars over its tracks between two or more railways, for which service it collects a certain switching charge for switching the cars, loaded or empty, but charges no traffic rates on the freight transported, or transferred, in the cars, such corporation, in the performance of such service, assumes none of the responsibilities of a common carrier, but only those of a switchman. In respect to cars or traffic thus handled, such corporation can only be regarded as a switchman or transfer company; and it is no more a common carrier of interstate commerce, or traffic, within the provisions of the law, than a city transfer company, which checks a passenger's baggage at the hotel where it is received, and carries it for an agreed compensation to the station of the railway over which it is to be transported into another state." That case is clearly distinguishable from the one at bar. It there appears that the charter of the bridge company made the bridge "a public thoroughfare or highway, for the use of which by railroads or street cars, wagons, vehicles, animals, and foot passengers it was authorized to charge reasonable toll. It was said in the opinion: "The franchises and powers conferred upon petitioner of building, maintaining, and operating its bridge and approaches, designated as its terminal facilities, do not, in and of themselves, constitute it a common carrier of property; on the contrary, they are appropriately confined to the erection and maintenance of a thoroughfare or public highway open to the use of others, common carriers and private parties, upon making compensation therefor, in the shape of 'reasonable tolls.'"

* * * The word, as used in its charter, is strictly applicable to charges for the use of its highway, rather than to compensation for transportation services to be performed by itself. The distinction between such an incorporated bridge, or highway, established and maintained for use by common carriers and others, upon paying compensation for such use, in the way of 'tolls,' however graduated, and that of an incorporated common carrier engaged in transporting property for hire, is well defined.

* * * The powers and franchises conferred upon petitioner find their legitimate scope and operation in the building, operat-

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ing, and maintaining its bridge and approaches thereto, for the public purposes it was intended to subserve—that of furnishing and forming a highway over which common carriers and others should have the right or privilege of transporting goods, or passing as they pass over a turnpike, a canal, or a ferry, upon paying reasonable tolls for the use of the structure or thoroughfare; and do not in any way constitute petitioner a common carrier of goods, authorized to equip its road, or to charge compensation for transporting goods on or over the same. Nor does petitioner, in the legal sense of the term, act or hold itself out to the public as a common carrier of property in connection with the railroads on either side of the Ohio river. It has no freight cars. When it solicits or accepts freight upon its tracks upon either side of the river for any railroad company it is compelled to call upon the railroad for whom the freight is intended, or over whose line it is to go, to furnish the cars in which to load the same. Such cars, the petitioner merely transfers over its bridge and delivers to the railroad furnishing the same, charging for its service its regular bridge toll, which is in no sense a charge for transporting the freight contained or carried in the car or cars. In some cases it makes an additional charge for switching cars which require to be transferred from one connection to another. Its object and purpose in thus constituting itself the soliciting agent for the railroad companies, who are willing to provide the cars for the freight it may secure, is manifestly to obtain 'tolls' for use of its bridge."

In the case at bar, the business of respondent differs materially from the business of the bridge company in the case last cited in that, instead of maintaining a highway for the use of other carriers, respondent uses its tracks and engines for the transportation of freight and cars of its patrons. As to the transferring of cars, loaded or empty, to and from the packing houses and transfer tracks of respondent and the railway companies, and to and from its yards, respondent is something more than a switching company. It is true the transfer of the cars from one track to another is necessary; but such transferring of cars to and from respondent's tracks and those of the connecting lines is not different than the transfer made between connecting lines of other companies who are recognized by all as common carriers. Such business of respondent in the handling of loaded cars intended for one of the industries established upon its tracks requires it to convey the car from the termini of the connecting railways to the industry or place of destination. This does not differ from the last haul made of freight shipped over the lines of several connecting railways, except that with respondent the distance is shorter than is usual in cases of other carriers. The fact that charges are fixed at so much for each car transferred,

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and are not based upon weight, bulk, or distance hauled, we think is unimportant. The statute declares any company engaged in the transportation of freight for hire is a common carrier. The charge made by respondent is its hire, and it transports freight notwithstanding the fact that it may not know the contents of the cars hauled, nevertheless it is the existence of a necessity for the transportation of freight which gives respondent occasion to exist.

In *Kentucky & Indiana Bridge Co. v. Louisville & Nashville Ry. Co.*, supra, it is true that the physical act of switching cars from one connecting line to another by the bridge company is similar to some of the work done by respondent herein, but such was only an incident to the principal business of the bridge company which was not that of a common carrier.

It is contended by respondent that the Railway Commission has jurisdiction only over such railroads as are recognized as such by section 4, art. 11, of the Constitution. That section reads as follows: "Railways heretofore constructed, or that may hereafter be constructed in this state are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulation as may be prescribed by law. And the Legislature may from time to time pass laws establishing reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads in this state. The liability of railroad corporations as common carriers shall never be limited." The Constitution does not declare what a railroad is. It declares that railways are public highways for the use of all persons for the transportation of their persons or property. Respondent's railways cannot be said to be a highway for the transportation of persons; but this fact does not prevent the respondent's business from coming within the jurisdiction of the Railway Commission under the authority conferred upon it by the recent amendment to the Constitution (section 421a, art. 16); and chapter 90, p. 311, Sess. Laws 1907. In other words, a company doing a transportation business may be a common carrier, although its traffic is over tracks which may not constitute a public highway within the meaning of the Constitution. Again, there is nothing in the Constitution as it originally stood, or in the 1906 amendment, nor in an act of the Legislature, which limits the term "common carrier" to railroads. It is equally applicable to a stage coach, a ferry boat, a street railway, a telegraph or telephone company. If a person or a corporation holds itself out to the public as offering its services to all persons similarly situated, and performs a service in the transportation of persons, freight, or intelligence, it is a common carrier in the particular spheres of such employment. Thus considered the re-

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spondent is brought within the constitutional and common-law definition of "common carrier." This obviously included all common carriers, whether railroad companies engaged in the transportation of both passengers and freight, or one only.

Respondent's transportation business is subject to the orders of the Railway Commission, and we recommend that the peremptory writ of mandamus of this court be issued, commanding respondent to forthwith file with the State Railway Commission all its freight schedules, classifications, rates, tariffs, and charges used by it and in effect June 1, 1907, pertaining to the transportation of freight.

PER CURIAM. For the reasons stated in the foregoing opinion, it is ordered that a peremptory writ of mandamus be issued, commanding respondent forthwith to file with the State Railway Commission all its freight schedules, classifications, rates, tariffs, and charges used by it and in effect June 1, 1907, pertaining to the transportation of freight.

CHICAGO, R. I. & P. RY. CO. v. RALSTON.

(Supreme Court of Kansas, Jan. 11, 1908.)

[93 Pac. Rep. 592.]

Carriers—Injuries to Passengers—Instruction.*—In an action to recover damages for injuries sustained while riding as a passenger in a caboose attached to a local freight train, an instruction which reads: "It is the duty of a railroad company transporting passengers on a freight train to exercise the highest possible degree of care and diligence to which such trains are susceptible, and a failure to use such degree of care is negligence on the part of the railway company," is erroneous, where no modification or explanation thereof is elsewhere given.

Same—Care Required.*—It is the duty of a railroad company when it carries passengers in a caboose or other car attached to a local freight train to use the highest possible degree of care and diligence in the protection of the safety of such passengers to which such train

*For the authorities in this series on the subject of the duties and liabilities of carriers with respect to passengers on freight trains, see foot-notes appended to *Rogers v. Choctaw, etc., R. Co.* (Ark.), 18 R. R. R. 592, 41 Am. & Eng. R. Cas., N. S., 592, where all those preceding it are collected; *Vassor v. Atlantic C. L. R. Co.* (N. Car.), 25 R. R. R. 629, 48 Am. & Eng. R. Cas., N. S., 629; *Marable v. Southern Ry. Co.* (N. Car.), 24 R. R. R. 418, 47 Am. & Eng. R. Cas., N. S., 418; *Lake Shore, etc., Ry. Co. v. Teeters* (Ind.), 24 R. R. R. 36, 47 Am. & Eng. R. Cas., N. S., 36; foot-notes appended to *Southern Ry. Co. v. Burgess* (Ala.), 21 R. R. R. 321, 44 Am. & Eng. R. Cas., N. S., 321.

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is susceptible considering its construction, equipment, and use as a carrier of freight.

(Syllabus by the Court.)

Error from District Court, Reno County; P. J. Galle, Judge.

Action by W. H. Ralston against the Chicago, Rock Island & Pacific Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

M. A. Low and *Paul E. Walker*, for plaintiff in error.
Prigg & Williams, for defendant in error.

GRAVES, J. This action was commenced in the district court of Reno county July 21, 1905, by the defendant in error against the plaintiff in error, to recover damages for injuries sustained by him while a passenger in a caboose attached to a local freight train. On January 27, 1906, the plaintiff obtained judgment in the district court, and the defendant, as plaintiff in error, brings the case here for review.

The plaintiff in error complains of the trial court for refusing to give instructions to the jury which were requested by it, and for giving others to which it objected. The instruction specially objected to reads: "It is the duty of a railroad company transporting passengers on a freight train to exercise the highest possible degree of care and diligence to which such trains are susceptible, and a failure to use such degree of care is negligence on the part of the railway company." There is nothing in the entire charge of an explanatory nature by which the jury could properly interpret this instruction, or correctly apply it to the facts being considered. This instruction is criticised as being misleading and erroneous, for the reason that the language used therein might easily be understood by the jury as a direction from the court to measure the care and diligence of the railroad company by a higher standard than the law requires. It is within the range of possibility to operate a local freight train quite smoothly and gently with little or no jolting or jarring; and, in the exercise of the highest possible degree of care and diligence as required by the court's instruction, it would be negligence on the part of the company not to operate its trains in that manner. To do so, however, would destroy the train's usefulness as a carrier of freight, and make passenger traffic thereon undesirable because of its lack of speed. It is not the purpose of the law to require railroad companies operating local freight trains on which passengers are carried to manage the train in a way to destroy or materially injure the principal business for which such a train is designed. Carrying freight is the chief purpose of local freight trains. They are constructed and equipped for that business only. In the conduct of such business it is necessary to start

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and stop often, to take in and set out cars, shift the train on side tracks, couple and uncouple cars, load and unload freight of all kinds, each of which takes time. These movements necessarily cause more or less jolting and jarring. All persons who ride as passengers in a caboose know this, and expect the delays, discomforts, and inconveniences which are unavoidable in the operation of such trains. In determining the degree of care and diligence required of railroad companies in the operation of trains of this character, these conditions should be recognized. We understand the rule to be that, when a railroad company carries passengers on its local freight trains as a business, it must use the highest possible degree of care and diligence of which such a train is susceptible in view of its construction, equipment, and use as a carrier of freight. To say that such a train shall be operated with the highest possible degree of care and diligence of which it is susceptible, without regard to the considerations named, places a duty upon the company operating such train which the law does not recognize.

The instruction given, and here criticised, was copied from the case of *M. P. Ry. Co. v. Holcomb*, 44 Kan. 332, 24 Pac. 467. The statement as a legal proposition is correct, but as used in that case the words "to which such trains are susceptible" were intended to include the conditions hereinbefore mentioned. The decision was made upon the authority of the case of *I. & St. L. R. R. Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898, and a large part of the opinion in that case was copied, adopted, and followed. A part of the opinion reads: "The terms in question do not mean all the care and diligence the human mind can conceive of, nor such as will render the transportation free from any possible peril, nor such as would drive the carrier from his business; * * * but it does emphatically require everything necessary to the security of the passenger, * * * and reasonably consistent with the business of the carrier, and the means of conveyance employed." From this it will be seen that this court, in the case above mentioned, held as it does now that a railroad company, when carrying passengers on a local freight train, is held to the highest possible degree of care and diligence in the protection of the safety of its passengers, but when determining whether that duty has been performed or not, the nature of the train, its construction, equipment, its duties as a carrier of freight, and other circumstances necessarily involved in its operation should be considered. We conceive this to be the rule supported by the authorities generally: *Mo. Pac. R. R. Co. v. Holcomb*, 44 Kan. 332, 24 Pac. 467; *Railroad Co. v. Horst*, 93 U. S. 291, 23 L. Ed. 898.

In case of *Portuchek v. Wabash R. Co.*, 101 Mo. App. 52, 74 S. W. 368, the Supreme Court of the state of Missouri said:

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"A passenger on a freight train takes it with all the incidentals usual in the operation of such a train, and submits himself to the inconveniences, and assumes the perils ordinarily attending such method of transportation; but by consenting to carry passengers on such trains the responsibility of the railroad for their safe transportation is not restricted or lessened, and the same degree of care is required in the management of a freight train carrying passengers as in the operation of a train exclusively for passenger service. In the words of Justice Swayne, 'Life and limb are as valuable, and there is the same right to safety in the caboose as in the palace car.' *Indianapolis, etc., R. Co. v. Horst*, 93 U. S. 296, 23 L. Ed. 898. But in the language approved in many of the decisions upon the subject, from the composition of freight trains and the appliances necessary in their operation there cannot, in the nature of things, be the same immunity from peril in traveling by freight trains as there is by passenger trains. The primary purpose of such trains is the transportation of freight, and the equipment, therefore, are adapted to such business; and such of the traveling public as elect to journey by freight trains are charged with the knowledge of such fact. It is not to be expected that there will be the same exactness in drawing up to a station by a freight train as by a train devoted to passenger service; and precisely the same degree of care exercised in the operation of both may produce different results respecting the safety of the passengers from the dangers inseparably connected with the conduct of one train, and not with the other, and this the public presumably understands, and conducts itself accordingly, and such inherent hazards the passenger is held to assume in taking a freight train." In case of *Erwin v. K., Ft. S. & M. R. Ry. Co.*, 94 Mo. App. 289, 68 S. W. 90, is to the same effect.

In the case of *Olds v. N. Y., etc., Railroad*, 172 Mass. 77, 51 N. E. 451, it is said: "It is the duty of a carrier of passengers to exercise the utmost care consistent with the nature of the carrier's undertaking, and with a due regard for all the other matters which ought to be considered in conducting the business. * * * If the business of a given line is the running of trains for freight with a car attached for passengers, the care required is such as ought to be exercised in running such trains."

In the case of *Railroad Co. v. Arnol*, 144 Ill. 261, 33 N. E. 204, 19 L. R. A. 315, it is said: "But it is insisted that the rule announced in these cases has no application here, for the reason that appellee, having voluntarily taken passage upon a freight train, assumed all risks incident to the operation of such train in the usual and ordinary manner in which such trains are managed and operated. Persons taking passage upon freight trains, or in a caboose or car attached to a freight train, cannot expect

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or require the conveniences, or all of the safeguards against danger, that they may demand upon trains devoted to passenger service, and are accordingly held to have accepted the accommodation provided by the company, subject to all of the ordinary inconveniences, delays, and hazards incident to such trains when made up and equipped in the ordinary manner of making up and equipping such trains, and managed with proper care and skill. The passenger has a right to presume that the train is thus made up and equipped, and that the cars, machinery, and appliances are not, of their kind, so materially defective as to increase the ordinary hazards of transportation by such trains. He may take the train or not at his option; and if he voluntarily selects such a train, he should be, and is, held to have accepted it in discharge of the liability of the carrier to provide a safer and better mode of conveyance, and to have assumed the risk and inconvenience incident to its proper management and operation. But, if a railway company consents to carry passengers for hire by such trains, the general rule of its responsibility for their safe carriage is not otherwise relaxed. From the composition of such a train, and the appliances necessarily used in its efficient operation, there cannot, in the nature of things, be the same immunity from peril in traveling by freight train as there is by passenger train; but the same degree of care can be exercised in the operation of each. The result in respect of the safety of the passenger may be wholly different because of the inherent hazards incident to the operation of one train and not to the other, and it is this hazard or peril arising from the negligence or want of proper care of those in charge of it. Ordinarily carriers of passengers for hire, while not insurers of absolute safe carriage, are held to the exercise of the highest degree of care, skill, and diligence practically consistent with the efficient use and operation of the mode of transportation adopted."

In the case of *Dunn v. Grand Trunk Railway*, 58 Me. 197, 4 Am. Rep. 267, it is said: "Undoubtedly a passenger taking a freight train takes it with the increased risks and diminution of comfort incident thereto, and if it is managed with the care requisite for such trains, it is all those who embark in it have a right to demand. * * * That a passenger takes all the risks incident to the mode of travel, and the character of the means of conveyance which he selects, the party furnishing the conveyance being only required to adapt the proper care, vigilance, and skill to that particular means, for this, and this only, was the defendant responsible. The passengers can only expect such security as the mode of conveyance affords." See, also, *McGee v. M. P. Ry. Co.*, 92 Mo. 208, 4 S. W. 739, 1 Am. St. Rep. 706; *O. & M. Ry. Co. v. Dickerson*, 59 Ind. 322; *Whitehead v. St. L. & I. M. R. R.* 99 Mo. 263, 11 S. W. 751, 6 L. R. A. 409; *Dodge v. B. & B.*

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Steamship Co., 148 Mass. 207, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541.

The trial court may have given these instructions upon the supposition that the language used included all the conditions above suggested. In the case from which the instruction was taken the court doubtless so understood it. But we think as an instruction to a jury the language is misleading and likely to give the jury an erroneous idea of the law applicable to such cases when used without modification or explanation as was done in this case.

The judgment is reversed, with direction to grant a new trial, and proceed with the case in accordance with the views herein expressed.

MOODY v. SOUTHERN RY. CO.

(Supreme Court of South Carolina, March 13, 1908.)

[60 S. E. Rep. 711.]

Carriers—Loss of Goods—Diligence—Evidence.—Civ. Code 1902, § 1710, provides that on the loss of goods shipped under a bill of lading providing that each carrier's liability shall cease on delivery to the succeeding carrier in good order, and its failure to adjust the loss within 40 days after notice, or to trace the freight and inform the party so notifying when, where, and by which carrier the freight was lost, damaged, or destroyed, the carrier shall be liable for all loss as if the loss had occurred on its own line. Held that, when goods were lost while being transported over connecting lines, evidence as to the diligence actually exercised in an effort to trace the goods and ascertain on what line they were lost, damaged, or destroyed was competent.

Evidence—Opinion.—Under Civ. Code 1902, § 1710, requiring a carrier to trace goods and notify the shipper as to the line on which they were lost or damaged within 40 days, a witness was not entitled to testify to his opinion as to the sufficiency of such period in which to find the goods, the question of due diligence being for the jury.

Carriers—Limited Liability—Connecting Carriers.*—Where a bill of lading provided that the connecting carriers were severally and not jointly liable, and that no carrier should be liable for loss or damage not occurring on its portion of the route, or after the property was ready for delivery to the consignee, each carrier became

*See foot-notes appended to *Southern Ry. Co. v. Waters & Co. (Ga.)*, 20 R. R. R. 480, 43 Am. & Eng. R. Cas., N. S., 480; foot-notes appended to *Allen, etc., Co. v. Canadian Pac. Ry. Co. (Wash.)*, 24 R. R. R. 75, 47 Am. & Eng. R. Cas., N. S., 75.

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liable for loss or damage only on its own line, and such liability terminated on delivery of the goods to the next carrier in the same order in which the preceding carrier received them.

Same—Bill of Lading.—Civ. Code 1902, § 1710, imposes a liability on a carrier for loss of goods shipped under a contract providing for transportation over the lines of two or more connecting carriers, where the responsibility of each or any of them ceases on delivery of the goods to the connecting carrier "in good order." Held, that a bill of lading limiting the carrier's liability to injuries or loss of goods on its own line, and providing that the carrier's responsibility should cease when it delivered the goods to the next carrier "in the same order in which the delivering carrier received them," constituted a contract in effect to deliver to the connecting carrier "in good order," and was therefore within the statute.

Same—Duty to Receive Goods.—Where flour was shipped on February 12, 1906, and thereafter remained in the possession of a railroad company until July 1st, when it was found and tendered to plaintiff, plaintiff was bound to receive the flour when tendered notwithstanding the delay; the carrier's liability being to render compensation for damages growing out of the delay, and not for loss of the flour.

Same—Connecting Carriers—Regulations—Violation—Penalty.—Where a bill of lading limited the carrier's liability to loss sustained on its own line, a connecting carrier on whose line a loss did not occur could not be charged with a penalty imposed by statute, providing that in case the carrier refused to pay for a loss within 60 days it would be subject to a penalty of \$50 in addition to the amount of the loss or damage.

Same—Payment of Loss—Receipt of Voucher—Question for Jury.—In an action against a carrier for damage to goods, whether plaintiff's receipt and retention of a voucher for the value of the goods constituted payment, held for the jury.

Same—Burden of Proof.—Where plaintiff received and retained a voucher from a carrier in payment for certain damaged goods, but did not take steps to collect the same, the burden was on the carrier to show that plaintiff received the voucher as payment.

Same—Estoppel.—The court properly refused to charge as a matter of the law that plaintiff's failure to return the voucher estopped him from claiming the value of the goods and a statutory penalty.

Appeal from Common Pleas Circuit Court of Sumter County;
J. C. Klugh, Judge.

Action by Burrell Moody against the Southern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Mark Reynolds, for appellant.

L. D. Jennings, for respondent.

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WOODS, J. This appeal is from a judgment of a magistrate court, affirmed by the circuit court, for \$23.20, the value of five barrels of flour alleged to have been lost between Nashville, Tenn., and Hagood, S. C., and \$50, the statutory penalty. Section 1710, Civ. Code 1902, and the act of February, 1903 (24 St. at Large, p. 81), on which the action depends, have been so often set out in recent cases that familiarity with them will be assumed. Testimony as to the diligence actually exercised in the effort to trace the goods and ascertain on what line they were lost, damaged, or destroyed, was of course admissible under section 1710 Civ. Code 1902; but evidently the magistrate was right in excluding the opinion of a witness as to the sufficiency of the 40 days allowed by the statute, and as to whether in case certain difficulties, not, however, appearing here, arose, the information could be given within the prescribed time. The question of due diligence was for the jury.

The bill of lading which was issued by Nashville, Chattanooga & St. Louis Railway Company contains the following clauses: "Received by the Nashville, Chattanooga & St. Louis Railway, at — station, —, 190—, from —, the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned, and destined as indicated below, which carrier agrees to carry to said destination, if on its own road, or otherwise to deliver to another carrier on the route to said destination. In consideration of the rate charged, under the conditions of this bill of lading, it is mutually agreed as to each carrier, severally, not jointly, of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, on the face or back hereof, all of which are agreed to by the shipper as owner or agent for the owner, and accepted for himself or his assigns as just and reasonable. No carrier shall be liable for loss or damage not occurring on its portion of the route, nor after said property is ready for delivery to consignee." These stipulations make each carrier liable for the loss or damage on its own line; and under them the responsibility of each carrier would cease when it delivered to the next carrier the goods in the same order in which it received them.

The first cause of action was brought under section 1710, Civ. Code 1902, which applies only when the contract of shipment provides the responsibility of each carrier shall cease on delivery to the connecting line "in good order." On the strictest technicality a distinction may be drawn between a bill of lading like this, under which the responsibility of each carrier is to cease when it delivers to the next carrier the goods in the same order

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in which it received them, and one under which the responsibility of each ceases on delivery to the next carrier "in good order." But the two contracts are substantially the same. For damage to goods there can be no delict of a connecting carrier who delivers the goods to the succeeding carrier in the same order in which it received them from the preceding carrier. Delivery by the carrier in the same order as existed at the receipt by it is a delivery in good order as far as that carrier is concerned. It is true the words "in good order" used in the statute are in quotation marks; but it would be disregarding the substance to hold the statute not to apply to contracts in which equivalent words are used. We do not question the authority of *Cave v. Railway Co.*, 53 S. C. 496, 31 S. E. 359; but it will be seen by reference to that case that there was no allegation in the complaint of any such provision in the contract of shipment as appear here in the bill of lading. The shipment, therefore, fell under the statute, and the magistrate was right in not granting the motion for a nonsuit as to the first cause of action.

There is evidence that the flour that was shipped on the 12th February, 1906, was found by the Georgia Railroad Company in its possession on 1st July, and immediately tendered to the plaintiff. Notwithstanding the delay the plaintiff was bound to receive the flour, the liability of the carrier being to compensate for the damages growing out of the delay, but not for loss. *Nettles v. Railroad Co.*, 7 Rich. Law, 190, 62 Am. Dec. 409; *Turner v. Railway Co.*, 75 S. C. 58, 54 S. E. 825, 7 L. R. A. (N. S.) 188; *McKerall v. Railroad Co.*, 76 S. C. 338, 56 S. E. 965. The magistrate was in error in refusing so to charge.

There was also error in refusing to charge the jury that, if loss of or damage to the flour did not occur on the defendant's own line, then there could be no recovery against the defendant for the statutory penalty. *Venning v. Railroad Co.*, 78 S. C. 42, 58 S. E. 983.

The defendant's agent testified he sent the plaintiff a voucher or order for payment of the value of the flour, issued by the Georgia Railroad Company, which plaintiff retained but did not present for payment. On this point the defendant requested the magistrate to charge the plaintiff could not recover the statutory penalty "when he accepts and retains the voucher for the value of the flour." There was no evidence of the negotiability of the voucher, or of its use by defendant, or of any action on his part, beyond his failure to return it, going to show an intention to accept the voucher in payment. Whether it was received as payment was a question of fact for the jury, the burden of proving it was so received being on the defendant. *Johnson v. Clarke*, 15 S. C. 72; *McKibben v. Salinas*, 41 S. C. 105, 19 S. E. 302. There was no error in refusing to charge the jury, as a legal

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proposition, the failure to return the order estopped plaintiff from setting up a claim for the value of the goods and the penalty. It was for the jury to say whether, under all the circumstances proved, the plaintiff should be charged with an intention to accept the order as payment.

The judgment of this court is that the judgment of the circuit court be reversed, and the cause remanded to the magistrate court for a new trial.

INTERSTATE CONSOLIDATED STREET RAILWAY COMPANY, Plff. in Err., v. COMMONWEALTH OF MASSACHUSETTS.

(Argued October 15, 16, 1907. Decided November 4, 1907.)

[28 Sup. Ct. Rep. 26.]

Corporations—Conditions of Incorporation—General Reference to Existing Laws.*—A street railway company whose charter subjects it to "all the duties, liabilities, and restrictions set forth in all general laws now or hereafter in force, relating to street railway companies," is bound by the requirement of a statute previously enacted, that street railway companies shall transport school children at a reduced rate, although such statute may be unconstitutional as to already existing corporations.

In Error to the Superior Court of the State of Massachusetts to review a conviction of a street railway company, on appeal from the First District Court of Bristol County, in that state, for refusing to transport school children at a reduced rate, exceptions having been heard by the Supreme Judicial Court and overruled. Affirmed.

See same case below, 187 Mass. 436, 73 N. E. 530.

The facts are stated in the opinion.

Messrs. Everett Watson Burdett and Joseph H. Knight, for plaintiff in error.

Messrs. Dana Malone and Fred T. Field, for defendant in error.

*See generally, foot-notes appended to *Virginia P. & P. Co. v. Commonwealth* (Va.), 18 R. R. R. 135, 41 Am. & Eng. R. Cas., N. S., 135.

For the authorities in this series on the subject of the police powers of a state over railroad companies, see foot-notes appended to *Railroad Com'rs v. Atlantic C. L. R. Co.* (S. Car.), 17 R. R. R. 505, 40 Am. & Eng. R. Cas., N. S., 505, where all the preceding ones are collected; foot-notes appended to *Osteen v. Southern Ry.* (S. Car.), 25 R. R. R. 300, 48 Am. & Eng. R. Cas., N. S., 300; foot-notes appended to *State v. St. Paul, etc., Ry. Co.* (Minn.), 23 R. R. R. 737, 46 Am. & Eng. R. Cas., N. S., 737; *Stone & Co. v. Atlantic Coast Line Ry. Co.* (N. Car.), 23 R. R. R. 420, 46 Am. & Eng. R. Cas., N. S., 420.

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MR. JUSTICE HOLMES delivered the opinion of the court:

This was a complaint against the plaintiff in error for refusing to sell tickets for the transportation of pupils to and from the public schools at one half the regular fare charged by it, as required by Mass. Rev. Laws, chap. 112, § 72. At the trial the railway company admitted the fact, but set up that the statute was unconstitutional, in that it denied to the company the equal protection of the laws and deprived it of its property without just compensation and without due process of law. In support of this defense it made an offer of proof which may be abridged into the propositions that the regular fare was 5 cents; that during the last fiscal year the actual and reasonable cost of transportation per passenger was 386-100 cents, or, including taxes, 410-100 cents; that pupils of the public schools formed a considerable part of the passengers carried by it, and that the one street railway expressly exempted by the law transported nearly one half the passengers transported on street railways and received nearly one half of the revenue received for such transportation in the commonwealth. The offer was stated to be made for the purpose of showing that the plaintiff in error could not comply with the statute without carrying passengers for less than a reasonable compensation and for less than cost. The offer of proof was rejected, and a ruling that the statute was repugnant to the 14th Amendment was refused. The plaintiff in error excepted and, after a verdict of guilty and sentence, took the case to the supreme judicial court. 187 Mass. 436, 73 N. E. 530. That court overruled the exceptions, whereupon the plaintiff in error brought the case here.

This court is of opinion that the decision below was right. A majority of the court considers that the case is disposed of by the fact that the statute in question was in force when the plaintiff in error took its charter, and confines itself to that ground. The section of the Revised Laws (chap. 112, § 72) was a continuation of Stat. 1900, chap. 197. Rev. Laws, chap. 226, § 2. *Com. v. Anselvich*, 186 Mass. 376, 379, 380, 104 Am. St. Rep. 590, 71 N. E. 790. The act of incorporation went into effect March 15, 1901. Stat. 1901, chap. 159. By the latter act the plaintiff in error was "subject to all the duties, liabilities, and restrictions set forth in all general laws now or hereafter in force relating to street railways companies, except," etc. § 1. See also, § 2. There is no doubt that, by the law as understood in Massachusetts, at least, the provisions of Rev. Laws, chap. 112, § 72, Stat. 1900, chap. 197, if they had been inserted in the charter in terms, would have bound the corporation, whether such requirements could be made constitutionally of an already existing corporation or not. The railroad company would have come into being and have consented to come into being subject

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to the liability, and could not be heard to complain. *Rockport Water Co. v. Rockport*, 161 Mass. 279, 37 N. E. 168; *Ashley v. Ryan*, 153 U. S. 436, 443, 38 L. Ed. 773, 777, 4 Inters. Com. Rep. 664, 14 Sup. Ct. Rep. 865; *Wight v. Davidson*, 181 U. S. 371, 377, 45 L. Ed. 900, 903, 21 Sup. Ct. Rep. 616; *Newburyport Water Co. v. Newburyport*, 193 U. S. 561, 579, 48 L. Ed. 795, 800, 24 Sup. Ct. Rep. 553.

If the charter, instead of writing out the requirements of Rev. Laws, 112, § 72, referred specifically to another document expressing them, and purported to incorporate it, of course the charter would have the same effect as if it itself contained the words. If the document was identified, it would not matter what its own nature or effect might be, as the force given to it by reference and incorporation would be derived wholly from the charter. The document, therefore, might as well be an unconstitutional as a constitutional law. See *Com. v. Melville*, 160 Mass. 307, 308, 35 N. E. 863. But the contents of a document may be incorporated or adopted as well by generic as by specific reference, if only the purport of the adopting statute is clear. *Corry v. Baltimore*, 196 U. S. 466, 477, 49 L. Ed. 556, 562, 25 Sup. Ct. Rep. 297. See *Purdy v. Erie R. Co.*, 162 N. Y. 42, 48 L. R. A. 669, 56 N. E. 508.

Speaking for myself alone, I think that there are considerations on the other side from the foregoing argument that make it unsafe not to discuss the validity of the regulation apart from the supposition that the plaintiff in error has accepted it. See *W. W. Cargill Co. v. Minnesota*, 180 U. S. 452, 468, 45 L. Ed. 619, 626, 21 Sup. Ct. Rep. 423. Therefore I proceed to state my grounds for thinking the statute constitutional irrespective of any disabilities to object to its terms.

The discrimination alleged is the express exception from the act of 1900 of the Boston Elevated Railway Company and the railways then owned, leased, or operated by it. But, in the first place, this was a legislative adjudication concerning a specific road, as in *Wight v. Davidson*, 181 U. S. 371, 45 L. Ed. 900, 21 Sup. Ct. Rep. 616, not a general prospective classification as in *Martin v. District of Columbia*, 205 U. S. 135, 138, 51 L. Ed. 743, 744, 27 Sup. Ct. Rep. 440. A general law must be judged by public facts, but a specific adjudication may depend upon many things not judicially known. Therefore the law must be sustained on this point unless the facts offered in evidence clearly show that the exception cannot be upheld. But the local facts are not before us, and it follows that we cannot say that the legislature could not have been justified in thus limiting its action. *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 597, 598, 41 L. Ed. 560, 566, 567, 17 Sup. Ct. Rep. 198. In the next place, if the only ground were that the charter of the

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elevated railway contained a contract against the imposition of such a requirement, it would be attributing to the 14th Amendment an excessively nice operation to say that the immunity of a single corporation prevented the passage of an otherwise desirable and wholesome law. It is unnecessary to consider what would be the effect on the statute by construction in Massachusetts if the exception could not be upheld. For, if in order to avoid the Scylla of unjustifiable class legislation, the law were read as universal (see *Dunbar v. Boston & P. R. Corp.*, 181 Mass. 383, 386, 63 N. E. 916), it might be thought by this court to fall into the Charybdis of impairing the obligation of a contract with the elevated road, although that objection might, perhaps, be held not to be open to the plaintiff in error here (*New York ex rel. Hatch v. Reardon*, 204 U. S. 152, 160, 51 L. Ed. 415, 422, 27 Sup. Ct. Rep. 188).

The objection that seems to me, as it seemed to the court below, most serious, is that the statute unjustifiably appropriates the property of the plaintiff in error. It is hard to say that street railway companies are not subjected to a loss. The conventional fare of 5 cents presumably is not more than a reasonable fare, and it is at least questionable whether street railway companies would be permitted to increase it on the ground of this burden. It is assumed by the statute in question that the ordinary fare may be charged for these children or some of them when not going to or from school. Whatever the fare, the statute, fairly construed, means that children going to or from school must be carried for half the sum that would be reasonable compensation for their carriage if we looked only to the business aspect of the question. Moreover, while it may be true that in some cases rates or fares may be reduced to an unprofitable point in view of the business as a whole or upon special considerations (*Minneapolis & St. L. R. Co. v. Minnesota*, 186 U. S. 257, 267, 46 L. Ed. 1151, 1157, 22 Sup. Ct. Rep. 900), it is not enough to justify a general law like this, that the companies concerned still may be able to make a profit from other sources, for all that appears (*Atlantic Coast Line R. Co. v. North Carolina Corp. Commission*, 206 U. S. 1, 24, 25, 51 L. Ed. 933, 944, 945, 27 Sup. Ct. Rep. 585).

Notwithstanding the foregoing consideration I hesitatingly agree with the state court that the requirement may be justified under what commonly is called the police power. The obverse way of stating this power in the sense in which I am using the phrase would be that constitutional rights, like others, are matters of degree, and that the great constitutional provisions for the protection of property are not to be pushed to a logical extreme, but must be taken to permit the infliction of some fractional and relatively small losses without compensation, for some, at least, of the purposes of wholesome legislation. *Martin v. District of*

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Columbia, 205 U. S. 135, 139, 51 L. Ed. 743, 744, 27 Sup. Ct. Rep. 440; *Camfield v. United States*, 167 U. S. 518, 524, 42 L. Ed. 260, 262, 17 Sup. Ct. Rep. 861.

If the 14th Amendment is not to be a greater hamper upon the established practices of the states in common with other governments than I think was intended, they must be allowed a certain latitude in the minor adjustments of life, even though by their action the burdens of a part of the community are somewhat increased. The traditions and habits of centuries were not intended to be overthrown when that Amendment was passed.

Education is one of the purposes for which what is called the police power may be exercised. *Barbier v. Connolly*, 113 U. S. 27, 31, 28 L. Ed. 923, 924, 5 Sup. Ct. Rep. 357. Massachusetts always has recognized it as one of the first objects of public care. It does not follow that it would be equally in accord with the conceptions at the base of our constitutional law to confer equal favors upon doctors, or working men, or people who could afford to buy 1000-mile tickets. Structural habits count for as much as logic in drawing the line. And, to return to taking of property, the aspect in which I am considering the case, general taxation to maintain public schools is an appropriation of property to a use in which the taxpayer may have no private interest, and, it may be, against his will. It has been condemned by some theorists on that ground. Yet no one denies its constitutionality. People are accustomed to it and accept it without doubt. The present requirement is not different in fundamental principle, although the tax is paid in kind and falls only on the class capable of paying that kind of tax,—a class of quasi public corporations specially subject to legislative control.

Thus the question narrows itself to the magnitude of the burden imposed,—to whether the tax is so great as to exceed the limits of the police power. Looking at the law without regard to its special operation I should hesitate to assume that its total effect, direct and indirect, upon the roads outside of Boston, amounted to a more serious burden than a change in the law of nuisance, for example, might be. See further *Williams v. Parker*, 188 U. S. 491, 47 L. Ed. 559, 23 Sup. Ct. Rep. 440. Turning to the specific effect, the offer of proof was cautious. It was simply that a "considerable percentage" of the passengers carried by the company consisted of pupils of the public schools. This might be true without the burden becoming serious. I am not prepared to overrule the decision of the legislature and of the highest court of Massachusetts, that the requirement is reasonable under the conditions existing there, upon evidence that goes no higher than this. It is not enough that a statute goes to the verge of constitutional power. We must be able to see clearly that it goes beyond that power. In case of real doubt a law must be sustained.

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MR. JUSTICE HARLAN is of opinion that the constitutionality of the act of 1900 is necessarily involved in the determination of this case. He thinks the act is not liable to the objection that it denies to the railway company the equal protection of the laws. Nor does he think that it can be held, upon any showing made by this record, to be unconstitutional as depriving the plaintiff in error of its property without due process of law. Upon these grounds alone, and independent of any other question discussed, he joins in a judgment of affirmance.

Judgment affirmed.

MR. JUSTICE MOODY, having been of counsel, did not sit in this case.

DAGGETT *et ux.* v. NORTH JERSEY ST RY. CO. *et al.*

(Court of Errors and Appeals of New Jersey, Nov. 18, 1907.)

[68 Atl. Rep. 179.]

Carriers—Injury to Passenger—Instructions.—A request to charge that would have required the jury to acquit the defendant railway company of negligence, even though the quick effort of the motor-man to stop the car were made carelessly and negligently, was properly refused.

Trial—Nonsuit.—Where, in an action against a street railway company and the owner of a wagon for injuries to a passenger in a car of the railway company caused by a collision between the car and the wagon, there was proof from which the jury might infer negligence of the driver of the wagon, there was no error in refusing to nonsuit the plaintiff on the motion of the owner of the wagon.

Same—Burden of Proof.—Where the plaintiff had made out a *prima facie* case of negligence, calling for explanatory evidence on the part of both defendants, it was not erroneous for the trial judge to refuse a request to charge that "the burden of proving negligence on the part of the defendant E. A. Williams Company is upon the plaintiff," in view of the fact that he did charge that, "the case having now closed and all the evidence on both sides having gone in, it is all, without any reference to which side it came from, so much material for your judgment to act upon, and that, in order that you should be satisfied that the E. A. Williams Company was negligent, it must appear to you, from all the evidence in the case, that that conclusion is established."

Appeal—Harmless Error—Cross-Examination.—An error of the court in sustaining an objection to a question on cross-examination, when the witness has already testified fully, during the course of the cross-examination, in respect to the matter excluded, and the

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party has the opportunity of pursuing his cross-examination as to the real question to which the excluded question was merely preliminary, is not reversible error.

Evidence—Experts—Hypothetical Question.—A hypothetical question to an expert, which assumes the facts in accordance with the theory of the party asking it, and which the evidence tends to prove, is proper where, although the facts are disputed, there is ample testimony tending to support every phase of the question, and sufficient to justify the submission thereof to the jury. It is not necessary that the question should embody all of the facts exhibited by the evidence. It is sufficient, on the contrary, if it embodies such a state of facts, fairly within the range of the evidence, as counsel propounding it deems to have been proved.

Street Railroads—Right of Way—Vehicles.*—The true rule is that the driver of a wagon has the right of way, if, proceeding at a rate of speed which, under the circumstances of the time and locality, was reasonable, he reaches the point of crossing in time to safely go upon the tracks in advance of the approaching street car, the latter being sufficiently distant to be checked, and, if need be, stopped before it reaches him. A request to charge on the subject of the right of way which ignored the limitations of that rule was properly refused.

Trial—Instructions—Necessity for Request.—The omission of a trial judge to instruct a jury on a particular point is not assignable as error, unless such instruction be specially requested.

Same—Repetition.—A party has no just cause of complaint where, although his requests for instruction have been refused, the court embraced them in its charge, so far as they stated correct propositions of law.

(Syllabus by the Court.)

Error to Circuit Court, Essex County.

Action by John Daggett and Nellie Daggett against the North Jersey Street Railway Company and E. A. Williams. Judgment for plaintiffs, and defendants bring error. Affirmed.

*For the authorities in this series on the subject of the mutual rights and duties of street railways and other users of streets, see foot-note appended to *Hayden v. Fair Haven & W. R. (Conn.)*, 10 R. R. R. 32, 33 Am. & Eng. R. Cas., N. S., 32, where all the preceding ones are collected; foot-notes appended to *Olney v. Omaha, etc., St. Ry. Co. (Neb.)*, 23 R. R. R. 300, 46 Am. & Eng. R. Cas., N. S., 300; foot-notes appended to *McCarthy v. Consolidated Ry. Co. (Conn.)*, 22 R. R. R. 685, 45 Am. & Eng. R. Cas., N. S., 685; foot-notes appended to *United Rys. & Elec. Co. v. Watkins (Md.)*, 22 R. R. R. 641, 45 Am. & Eng. R. Cas., N. S., 641; foot-notes appended to *Indianapolis Trac. & Term. Co. v. Kidd (Ind.)*, 22 R. R. R. 366, 45 Am. & Eng. R. Cas., N. S., 366; *Weinberger v. North Jersey St. Ry. Co. (N. J.)*, 22 R. R. R. 351, 45 Am. & Eng. R. Cas., N. S., 351.

Daggett v. North Jersey St. Ry. Co

John A. Bernhard and Hobart Tuttle, for plaintiff in error
North Jersey Street Railway Company.

John J. Hoppin and Harry V. Osborne, for plaintiff in error
E. A. Williams.

Harry Kalisch, for defendants in error.

TRENCHARD, J. This writ of error brings under review a judgment of the Essex circuit court in favor of the defendants in error, the plaintiffs below. The action was one of tort for negligence. Upon the trial there was evidence tending to prove the following facts: Nellie Daggett, wife of John Daggett, was a passenger on a trolley car of the North Jersey Street Railway Company, which was propelled along Bloomfield avenue, in the city of Newark, and which collided with a wagon of the other defendant company, E. A. Williams, at the corner of Bloomfield avenue and Parker street. The car was an open car, and the plaintiff sat in the first cross-seat inside the car with her back to the motorman. The plaintiff heard a crash, her head was thrown backward, and struck the woodwork of the car, and she was injured. The collision occurred in broad daylight, in a straight avenue. The car was moving on the south-bound track. The wagon was approaching the car on the north-bound track. The driver of the wagon turned to cross the south-bound track for the purpose of driving into Parker street. There were no obstructions to the view of the two men who were charged with the management of the two vehicles. The motorman could see the driver and his wagon. The driver could see the motorman and his car; and each did see the other. The case was submitted to the jury, who found a verdict for the plaintiffs. The defendant the North Jersey Street Railway Company sued out a writ of error and the defendant E. A. Williams joined in the prosecution of the writ by virtue of the act of 1906, and has assigned errors in its own behalf.

The sole assignment of error relied upon the defendant railway company is based upon the refusal of the learned trial judge to charge the jury specifically the following request: "That if the motorman of the car suddenly found himself, without any negligence on his part, in a dangerous position, and exercised a quick effort to stop the car, thereby causing the plaintiff's head to be thrown back, the company would not be liable." If the plaintiff's contention as to the state of the proofs is correct, there was no basis in the evidence for the hypothesis proposed by this request. If this be so, it, of course, was properly refused. But, whether this be so or not, we think it was properly refused. Reliance is placed by the railway company upon the case of *Corkhill v. Camden & Suburban Ry. Co.*, 69 N. J. Law, 97, 54 Atl. 522. That case came before the Supreme Court on a rule to show cause, and there was no evidence to show any want of care in either

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motorman or conductor in attempting to cross the railroad tracks, and, on the contrary, there was affirmative evidence to show that the conductor took every reasonable precaution. Mr. Justice Pitney, speaking for the court, held that with respect to the conduct of the motorman in turning on full power when confronted with the impending danger of a collision with the railroad train his act evinced complete presence of mind and the exercise of the highest degree of care. But this was a finding of fact, or, rather, a finding of a conclusion that was supported by the overwhelming weight of evidence. At the same time, he pointed out that the cases holding street car companies liable for injuries to passengers caused by a lurch of the car had gone upon the ground that there was a sudden increase of speed under circumstances that evinced a disregard of the safety of passengers—that is, under circumstances of negligence. The fatal defect in the request under consideration is that it would have required the jury to acquit the defendant railway company, even though the quick effort of the motorman to stop the car were made carelessly and negligently. In the Corkhill Case the overwhelming weight of the evidence showed that the increase of speed was applied in the exercise of a high degree of care. If that hypothesis (care in the motorman) had been imported in the request under consideration, then the request would have been proper, provided there was any evidence to support the theory of fact upon which it was based.

The first assignment of error on behalf of the defendant E. A. Williams requiring consideration challenges the correctness of the refusal of the motion to nonsuit the plaintiff. From an examination of the evidence on the part of the plaintiff sent up with the bill of exceptions, we think there was *prima facie* evidence of negligence of the defendant Williams. Reviewing the evidence on the part of the plaintiff, we perceive that it tended to show that the wagon of the defendant Williams, driven by his servant, collided in broad daylight with the car of the defendant railway company running on a straight track on a straight street, and in the collision the plaintiff was hurt. The driver of the wagon testified that at the point where the collision took place "you can see three miles" along the car track. In view of the duty that is imposed upon all users of the public highway to exercise reasonable care to avoid collision with each other, such a *prima facie* case as was made by the plaintiff properly called for explanatory evidence on the part of both defendants. So to hold will put the case in accord with *Sheridan v. Foley*, 58 N. J. Law. 230, 33 Atl. 484; *Trenton Pass. Ry. Co. v. Cooper*, 60 N. J. Law. 219, 37 Atl. 730, 38 L. R. A. 637, 64 Am. St. Rep. 592; *Bergen County Traction Co. v. Demarest*, 62 N. J. Law, 755, 42 Atl. 729, 72 Am. St. Rep. 685. Furthermore, the case so made by the

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plaintiff was one upon which she was entitled to have a finding by a jury, because whether the facts proved on her part spoke of actionable negligence by the defendants or not was at least a matter debatable by fair-minded men. *Mahnken v. Freeholders of Monmouth*, 62 N. J. Law, 404, 41 Atl. 921. The question was not what the trial judge would infer from the evidence, but whether the jury might legitimately conclude that the proofs of the plaintiff showed the defendant Williams to have been negligent. *Newark Pass. Ry. Co. v. Block*, 55 N. J. Law, 605, 27 Atl. 1067, 22 L. R. A. 374; *Traction Co. v. Scott*, 58 N. J. Law, 682, 34 Atl. 1094. The application of these principles to the facts of the present case justified, and indeed required, the refusal of the motion of nonsuit.

The second assignment of error on behalf of the defendant Williams requiring consideration is based upon the exception to the refusal of the trial judge to charge a request as follows: "The burden of proving negligence on the part of the defendant E. A. Williams Company is upon the plaintiff." Where, as in this case, the plaintiff had made out a prima facie case of negligence, calling for explanatory evidence on the part of both defendants, it was not erroneous for the trial judge to refuse the request in question, especially in view of the fact that he did charge that, "the case having now closed and all the evidence on both sides having gone in, it is all, without any reference to which side it comes from, so much material for your judgment to act upon, and that, in order that you should be satisfied that the E. A. Williams Company was negligent, it must appear to you, from all the evidence in the case, that that conclusion is established." *Shay v. Camden & Suburban Ry. Co.*, 66 N. J. Law, 334, 49 Atl. 547; *Bergen County Traction Co. v. Demarest*, 62 N. J. Law, 755, 42 Atl. 729, 72 Am. St. Rep. 685.

The third assignment of error requiring notice relates to the action of the trial judge in overruling a question asked by counsel of the defendant Williams on cross-examination of Mrs. Landmasser: "Well, was there anything unusual about the speed of this car?" The question was objected to as leading, which, of course, is not a good objection to a question asked on cross-examination. Assuming, but not deciding, that the defendant Williams was entitled to show that the speed of the car was unusual, we think the exclusion of this particular question was, under the circumstances, harmless, and therefore not reversible error. The cross-examination of the witness proceeded as follows: "Q. Now, as you approached the scene of the accident, how fast did you say the car was going? A. Pretty fast. Q. Pretty fast? A. Yes, sir. Q. Anything extraordinary about the speed? Mr. Bernhard: I object. That is not cross-examination, as far as you are concerned. The court: Do you object on the

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ground that it is leading? Mr. Bernhard: Yes, I do. The court: Objection sustained. Ask her what she means by 'pretty fast?' Q. What do you mean by 'pretty fast?' A. It was going rapidly. Q. Rapidly? A. Yes, sir. Q. Is that the best answer you can give to me as to what you mean by 'pretty fast?' A. It was going fast, that is all the answer I can give you. Q. Do you know how fast trolley cars ordinarily run? Mr. Bernhard: I object to that as immaterial. The court: I do not think it is possible to answer that question. Q. Well, was there anything unusual about the speed of this car? Mr. Bernhard: Objected to as leading. The court: Objection sustained." Counsel for defendant E. A. Williams prayed and was allowed an exception to this ruling of the court. It will be noticed that the witness had testified that the car was going "pretty fast," and she had stated "that is all the answer I can give you." It is quite evident that the real question in this connection was this: What was the speed of the car? The question excluded can only be regarded as preliminary to that. In any other view, it had no probative force. Its exclusion did not conclude the cross-examination. It might have been followed by the direct question as to what was the speed of the car, even though the court did rule out the preliminary question. The trial judge had already indicated what the real question was, and that the examination might be pursued along that line. An error of the court in sustaining an objection to a question on cross-examination, when the witness has already testified fully, during the course of the cross-examination, in respect to the matter excluded, and the party has the opportunity of pursuing his cross-examination as to the real question to which the excluded question was merely preliminary, is not reversible error. *Thompson on Trials*, § 707; *Bonnet v. Glattfeldt*, 120 Ill. 166, 11 N. E. 250.

The fourth assignment of error on behalf of the defendant Williams relates to the admission of a hypothetical question. The question to which objection was made was asked by counsel for plaintiffs of Dr. Post on direct examination. It was as follows: "Q. Now, doctor, assuming that the plaintiff was a passenger on a car and the car came into collision with a wagon, by means whereof her head was thrown back with sufficient force to break her back comb, and to render her unconscious, and that she remained unconscious for a long period of time, more than an hour; that she was taken to a hospital, and then could recall for the first time where she was, and then that she had after this periods of severe headache and pain in the spine and nervous feelings; that before that time she had been a woman in good health—to what would you attribute this condition?" The contention of the defendant is that this question was objectionable, on the alleged ground that it did not embody the facts and all of the facts as proved. A hypothetical question to an expert, which

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assumed the facts in accordance with the theory of the party asking it, and which the evidence tends to prove, is proper where, although the facts are disputed, there is ample testimony tending to support every phase of the question, and sufficient to justify the submission thereof to the jury. *Jackson v. Burnham*, 20 Colo. 532, 39 Pac. 577; *Thompson on Trials*, § 606. It is not necessary that hypothetical questions should embody all the facts exhibited by the evidence. It is sufficient, on the contrary, that they embody such a state of facts fairly within the range of the evidence as the counsel propounding them deem to have been proved. *Thompson on Trials*, § 610. An examination of the evidence shows that the question objected to was well within the rule above stated.

The fifth assignment of error requiring remark relates to the refusal of the trial judge to charge a request submitted on behalf of the defendant Williams as follows: "The vehicle reaching the point of crossing first, going at the rate of speed at which they were approaching the crossing, had the right of way." We think this request was properly refused. The true rule is that the driver of the wagon would have had the right of way if proceeding at a rate of speed which, under the circumstances of the time and locality, was reasonable, he should reach the point of crossing in time to safely go upon the tracks in advance of the approaching street car, the latter being sufficiently distant to be checked, and, if need be, stopped before it should reach him. *Electric Ry. Co. v. Miller*, 59 N. J. Law, 423, 36 Atl. 885, 39 Atl. 645. The request under consideration entirely ignored the limitations of that rule, and was properly refused.

The sixth assignment of error, requiring consideration on behalf of the defendant Williams, rests upon an exception to the charge of the court, which exception is based upon an omission to charge. The omission of a trial judge to instruct a jury on a particular point is not assignable as error, unless such instruction be specially requested. *Camden & Atlantic R. R. Co. v. Williams*, 61 N. J. Law, 646, 40 Atl. 634. There being no request to charge the matter in question, its omission is not reversible error.

The remaining assignments of error requiring remark all relate to the refusal of the trial judge to charge several requests. An examination of all of them, in connection with the charge, shows that they were all in effect acceded to by the trial judge. A party has no just cause of complaint where, although his requests for instruction have been refused, the court embraced them in its charge, so far as they stated correct propositions of law. *Thompson on Trials*, § 2351.

We have examined with care all other assignments of error, and find none requiring comment.

The result is that the judgment below should be affirmed.

PEOPLE, *ex Inf. of HEALY, State's Atty., v. ILLINOIS CENT. R. Co. et al.* SAME *v. CHICAGO, B. & Q. R. Co. et al.* SAME *v. CHICAGO, R. I. & P. RY. Co. et al.*

(Supreme Court of Illinois, Feb. 20, 1908. Rehearing Denied, April 10, 1908.)

[84 N. E. Rep. 368.]

Carriers—Regulation—Duty to Maintain Warehouse.—A railroad company cannot be compelled to maintain a public warehouse, unless it has the power to act as a public warehouseman.

Corporations—Powers.—A corporation can exercise its express powers, and such others as are necessary to carry the express powers into effect.

Same—"Implied Power."—An "implied power" of a corporation is one that is directly and immediately appropriate to the execution of its express powers, and not one that has but a slight, indirect, or remote relation to the specific purposes of the corporation.

Carriers—Duty to Maintain Warehouse.—Hurd's Rev. St. 1905, c. 114, § 3, requires railroad companies to transport grain in bulk, but there is nothing in the statute requiring them to maintain regular public warehouses.

Same.*—A railroad company has no power, either express or implied, to maintain a regular public warehouse as an incident to its duty as public carrier.

Dedication.—A railroad company's property, devoted for a long term of years to use as a regular public warehouse for the convenience of members of a grain trading exchange, is not thereby impressed with the right of the public to have such use continued.

Evidence—Judicial Notice.†—It is so well known that the court may take judicial notice that grain coming to Chicago by any railroad may be transferred by means of the belt roads to any warehouse in any part of the city.

Appeal from Circuit Court, Cook County; Lockwood Honore, Judge.

Informations in the nature of bills in equity by the people of

*For the authorities in this series on the question, what are, and are not, the implied powers of a railroad corporation, see foot-note appended to *Western Maryland R. Co. v. Blue Ridge Hotel Co.* (Md.), 19 R. R. R. 581, 42 Am. & Eng. R. Cas., N. S., 581, where all those preceding it are collected; *Delaware, etc., R. Co. v. Kutter* (C. A.), 24 R. R. R. 385, 47 Am. & Eng. R. Cas., N. S., 385.

†For the authorities in this series on the subject of judicial notice of matters relating to railroads, see foot-notes appended to *Fleischman, etc., Co. v. Southern Ry.* (S. Car.), 26 R. R. R. 258, 49 Am. & Eng. R. Cas., N. S., 258; *Southern Ry. Co. v. Gullat* (Ala.), 25 R. R. R. 336, 48 Am. & Eng. R. Cas., N. S., 336.

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the state of Illinois by John J. Healy, States's Attorney, on the relation of the Chicago Board of Trade, against the Illinois Central Railroad Company and others, the Chicago, Burlington & Quincy Railroad Company and others, and the Chicago, Rock Island & Pacific Railway Company and others. From decrees dismissing the informations, the relator appeals. Affirmed.

This is an information in the nature of a bill in equity filed by the people of the state of Illinois, by the state's attorney of Cook county, on the relation of the Chicago Board of Trade, to enjoin the Illinois Central Railroad Company, the Central Elevator Company, and certain individuals who have the control and management of certain public grain elevators from discontinuing the operation of such grain elevators as public warehouses of class A. Upon the execution of a bond in the sum of \$20,000 by the Chicago Board of Trade a temporary injunction was awarded in accordance with the prayer of the information. Subsequently, by amendment, the Chicago Board of Trade, as relator, was stricken from the information, and the cause thereafter proceeded in the name of the people, by John J. Healy, State's attorney of Cook county. The defendants filed a motion to dissolve the injunction, which, upon a hearing before Judge Honore, of the circuit court of Cook county, was sustained, and the information dismissed for want of equity. From this decree the people of the state of Illinois have prosecuted an appeal to this court.

By an order entered in vacation by Mr. Justice Carter, of his court, the temporary injunction was continued in force until the final hearing of this appeal. Similar informations were filed against the Chicago, Burlington & Quincy Railroad Company and others, and the Chicago, Rock Island & Pacific Railway Company and others. These cases have been consolidated in this court, and will be disposed of as one case.

The material averments of the information are that the Illinois Central Railroad Company is a common carrier, created by special statute of this state, with power to locate, construct, maintain, and operate a railroad between different terminals in this state, and with power to acquire, by purchase or condemnation, and to hold, such real and personal estate as may be needful to carry into effect the purposes and objects of said special statute; that among other lands acquired by said company for railroad purposes were two parcels of land in Chicago contiguous to the Chicago river and Lake Michigan, upon which private parties erected two grain warehouses of a joint capacity of 2,500,000 bushels, equipped with different compartments, elevating machinery, and apparatus, in which warehouses grain of the same grade might be mixed and stored in bulk; that these warehouses were acquired by said railroad company and leased to private cor-

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porations, who have operated one or both as public warehouses of class A; that switch tracks were constructed by said company from its main lines to said warehouses, so that cars loaded with grain coming into Chicago over its lines could be run directly to said warehouses, and by means of said appliances such grain could be promptly and mechanically unloaded from cars to said elevators or warehouses and from said elevators or warehouses unloaded into vessels and other cars; that with the exception of a short period when said elevators were destroyed by the fire of 1871 at least one of said warehouses has been since 1856 continuously conducted and maintained, with the sanction of said railroad company, as a public warehouse of class A, and said railroad company has invited shippers of grain over its line to have grain shipped by them over said lines and unloaded into the said warehouses, and has held out such elevators or warehouses to the public as public warehouses, so that at all times since 1856, except during the interval of rebuilding of the warehouses caused by the fire, every shipper of grain over said railroad has at all times been able to have his grain unloaded into a public warehouse in Chicago and to have issued to him a warehouse receipt representing said grain, and to have said grain there remain until the shipper could advantageously sell or reship the same, and in case of reshipment to other points, to expeditiously and economically and mechanically unload such grain upon cars or boats for reshipment, and no shipper of grain over said lines has since said year been obliged to unload said grain from cars, or been deprived of having his grain unloaded into a public grain elevator or warehouse, or been deprived of the facilities for economically and mechanically and expeditiously transferring said grain to other cars or boats, to be shipped to points beyond Chicago, which said warehouses afford; that grain shippers have become accustomed to rely upon and have adjusted their business methods to this manner of handling grain in Chicago; and that, if said warehouses were now to cease to be conducted as public warehouses of class A, irreparable injury would result to them.

The information, proceeding, stated the amount of grain shipped and stored for a period of 32 years, and that it would be impossible to properly handle or reship all grain coming into Chicago over the lines of said railroad without the use, as public warehouses, of one or both of said elevators, or others of like construction, situation, and capacity, and the issuance of warehouse receipts; that during all this time elevators have been operated by private parties, and that since 1886 said elevators have been leased to appellee the Central Elevator Company; that the appellees, the members of the firm of Bartlett, Frazier & Carrington, who were the stockholders of the appellee the Cen-

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tral Elevator Company, have announced that after July 1, 1907, "they would not comply with the rules of said board, and make their receipts regular for delivery upon contracts upon said board of trade;" and that neither of the said warehouses will remain or be conducted as a public warehouse. The information further says that there are now no other public grain warehouses, except one of the said elevators or warehouses operated by appellee the Central Elevator Company in the city of Chicago upon the lines of said Illinois Central Railroad Company; that if shippers of grain to Chicago over the lines of said railroad company were now to be deprived of having their grain unloaded into public warehouses and having it remain there until resold or reshipped, and having issued to them, while said grain is in store, warehouse receipts of the character to be current in Chicago, their right to market and sell their grain in Chicago will be much impaired; that the people, and especially those engaged in raising, shipping, handling, or selling of grain in this state, will be unduly prejudiced if a temporary injunction should not issue against appellees immediately and without notice.

The information further charges "that the Chicago Board of Trade has had for many years, and now has, a rule prescribing that to make elevator receipts issued by any public grain elevator in Chicago deliverable upon contracts made upon said board of trade the manager of such warehouse shall conduct such warehouse in accordance with the laws of the state of Illinois, and shall give a bond to the board of trade to protect its members against any failure of said warehouseman to properly conduct said warehouse; that for many years, and during all the time such rule has been in force, every public grain warehouse of class A in Chicago has complied with this requirement, and thereby made its receipts regular for delivery on the said board of trade, where most of the business of buying and selling grain for present and future delivery in the city of Chicago is transacted, * * * and that much of said grain since the year 1856 has been, and now is, sold upon such exchange for future delivery and before its arrival in Chicago; and that by the usages of trade and the rules of such exchange which have prevailed during all of said time such future contracts can only be performed by the delivery of warehouse receipts issued by public warehouses located in Chicago."

W. H. Stead, Atty. Gen., *John J. Healy*, State's Atty., and *Henry S. Robbins*, for appellant.

John G. Drennan (*W. S. Kenyon* and *J. M. Dickinson*, of counsel), for appellee Illinois Central Railroad Company.

George P. Merrick, for other appellees.

VICKERS, J. (after stating the facts as above). The question

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over which the most serious contention exists in this case is whether the railroad company has the power, under its charter, to maintain and operate, or cause to be operated, the elevators in question as public warehouses of class A. If the prayer for a perpetual injunction is granted, the duty of the railroad company to maintain these elevators as public warehouses would thereby be legally established. There are only two methods by which the railroad company could comply with the decree, if the injunction were granted. The railroad company must either operate the elevators itself, or lease them to other persons, and require the lessees to comply with the decree. If the latter course be pursued, the primary responsibility would rest on the railroad company. It could not excuse itself for a failure to obey the decree by showing that it had contracted with another to perform the duty required of it.

Appellants suggest that the power of the railroad company to operate the elevators in question directly, as public warehouses, does not arise as a practical question, since by making the rentals reasonable the company would always be able to find some one who would be willing to lease the elevators and agree to operate them in the required manner. We fail to see the force of this contention. If the railroad company does not possess the power to directly engage in the warehouse business, it would seem to be paradoxical to compel it to contract with another to carry on such business and hold it responsible for the faithful observance of the decree by such third party. In *First M. E. Church of Chicago v. Dixon*, 178 Ill. 260, 52 N. E. 887, this court held that the church, having no power to devote its real estate to secular purposes for gain, could not, by executing a lease, authorize its lessee to erect a building to be used as an office building, even though a part of such building was reserved for the use of the congregation as a place for religious worship. See, also, *Thomas v. Railroad Co.*, 101 U. S. 71, 25 L. Ed. 950.

Appellants do not, however, seem to rest much confidence in the suggestion above referred to. Recognizing the real question to be the existence or nonexistence of the power in the railroad company to own and operate these warehouses, they unreservedly assert that the company has power to both own and operate the warehouses in connection with and as a part of its railroad. The general rule in regard to the powers of corporations, established by many decisions of this court, is that they may exercise those powers expressly given, and such others as are necessary to carry the express powers into effect. *Rockhold v. Canton Masonic Benevolent Society*, 129 Ill. 440, 21 N. E. 794, 2 L. R. A. 420; *People v. Pullman's Palace Car Co.*, 175 Ill. 125, 51 N. E. 664, 64 L. R. A. 366. It is not contended that the power to own and operate public warehouses as a business

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is expressly conferred by the special charter of the Illinois Central Railroad Company, or by any general law relating to railroads in this state. Appellants' contention is that the power contended for is implied, because its exercise is necessary in order to enable the railroad company to accomplish its duties as a common carrier of grain. A power which the law will regard as existing by implication must be one in a sense necessary, that is, needful, suitable, and proper to accomplish the object of the grant—one that is directly and immediately appropriate to the execution of the specific powers—and not one that has but a slight, indirect, or remote relation to the specific purposes of the corporation. *Chicago Gas Light Co. v. People's Gas Light Co.*, 121 Ill. 530, 13 N. E. 169, 2 Am. St. Rep. 124; *People v. Pullman's Palace Car Co.*, *supra*.

A public warehouse is defined by the Constitution of this state as follows: "All elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, are declared to be public warehouses." By the statutes of the state public warehouses are divided into three classes, designated as classes "A," "B," and "C." Public warehouses of class A include all warehouses, elevators, and granaries in which grain is stored in bulk, and in which the grain of different owners is mixed together so that the identity of different lots cannot be accurately preserved. Warehouses, elevators, or granaries of class A are only located in cities having not less than 100,000 inhabitants. The statute in relation to warehouses of this class provides that before the warehouseman shall enter upon his business he shall give a bond and take out a license to act as such public warehouseman. When he has obtained his license he is thereupon required to store grain tendered to him by the public, to care for the grain, to issue warehouse receipts therefor, and cancel the same upon delivery, make regular reports of the condition of the grain, amount stored, and all other matters connected with his business as a public warehouseman of class A. Among the duties required of public warehousemen by the statute is that the warehouse shall be, in fact, what its name implies—a public warehouse—in the sense that it must serve the public by accepting and storing grain tendered for storage by all persons indiscriminately.

It will be observed that the information does not seek to compel the railroad company to provide warehouse facilities for such grain as it transports to Chicago as a common carrier, but the prayer is, in effect, that the company shall continue to operate, or cause to be operated, the two elevators in question as public warehouses of class A. Nor is there any averment in the information that any shipper of grain over the railroad has been denied

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ample storage facilities, or that there is any threat to so deny them. But it is insisted by appellants that the maintenance of such warehouses is incidental to, and necessary in connection with, the railroad's duty to the public as a common carrier of grain. The primary purpose of a commercial railroad is to carry freight and passengers for hire from one point to another on its line. Such corporations obtain valuable franchises from the state, and in return they engage to carry, without discrimination, for all persons who see proper to employ them. To enable such corporations to discharge their functions they must, of necessity, exercise various powers not expressly granted by their charters. Powers are given, by implication, to discharge all duties which such corporations owe to the public. Wherever the law exacts a duty of a corporation to the public, the existence of the duty implies the power to perform it. It would be idle for the state to impose a duty on such companies, and at the same time withhold from them the power to perform it. Implied powers are never allowed to enlarge express powers, so as to warrant the corporation in devoting its capital to purposes not expressly authorized, or to engage in enterprises not directly, but only remotely, connected with its specific corporate purposes. *First M. E. Church of Chicago v. Dixon*, supra. It is the duty of every railroad corporation which shall receive any grain in bulk for transportation to any place within this state to transport the same and deliver it to the consignee, provided such delivery can be made over any lines of road which the carrier is permitted to use, and all railroads are required to permit connections to be made and maintained with their tracks to and from any and all public warehouses where grain is or may be stored. Hurd's Rev. St. 1905, c. 114, § 3.

It will thus be seen that there is nothing in the statute imposing the duty on a railroad company to furnish public warehouse facilities, or to engage in the business of public warehousing, and issue receipts to meet the wants or convenience of members of a trading exchange. It may be conceded that, as incidental to their duty to transport grain in bulk, railroad companies may, under some circumstances, have the power to furnish storage room for grain at important transfer points temporarily, to enable the owner to collect enough for a cargo where the grain is to be reshipped by water, and it is well known that many railroads maintain grain elevators for such purposes; but such storage contemplates a rotation, so that no one shipper or consignee can monopolize all the storage room, and hold the same indefinitely, or until the market seems to justify him in selling his grain. The duty of the railroad company to the public to transport all the grain that is offered for transportation forbids the company from adopting a method of business which would permit third parties,

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over whom the company has no control, to use its storerooms and warehouses indefinitely, to the exclusion of other patrons and the embarrassment of the company in the performance of its duty as a carrier. The combined capacity of the two elevators in question is 2,500,000 bushels, which is less than 10 per cent. of the grain annually transported to Chicago by the Illinois Central Railroad Company. If appellants' contention is sustained, it would be possible for one buyer of grain to monopolize all the bins in these two elevators. One person might thus become the owner of all the grain in the elevators. Appellants would compel the railroad company, or its lessees in charge of the elevators, to issue such owner warehouse receipts for the grain stored. As long as the owner is willing to pay storage charges to a public warehouse, we know of no law limiting the time of storage. Under the possible condition suggested, the ability of the railroad company to serve the public would be dependent upon the will and pleasure of the owner of the grain in the elevators. While this might be a great convenience to persons engaged in trading on the board of trade, we are unable to see how the public generally will be benefited, or the railroad company will thereby be the better able to discharge its duties as a carrier. The producer and consumer of grain alike require the services of railroad companies to transport grain from the former to the latter, but neither will be benefited by having the grain lodged in a public warehouse at some intermediate point for an indefinite time, in order to allow speculators to use the receipts representing such grain as a trading commodity. That a railroad company has no power, either express or implied, to own and operate a public warehouse as an incident to public purposes as a public carrier, is, in our opinion, supported by sound reason and authority.

In *Franklin Nat. Bank v. Whitehead*, 149 Ind. 560, 49 N. E. 592, 39 L. R. A. 725, 63 Am. St. Rep. 302, it was held that only corporations organized for the purpose of carrying on the business of warehousemen were authorized to take out a license to conduct a general warehouse business, notwithstanding the statute of that state provided that "any person or incorporated company" might obtain a permit to keep a public warehouse. In that case a corporation for manufacturing purposes applied for and obtained a license to keep a public warehouse. It issued warehouse receipts upon its own products on hand, and pledged such receipts as security to the bank. It was held that the warehouse receipt was void and conferred no rights upon the bank, for the reason that the corporation issuing such receipt was not incorporated for the purpose of conducting a warehouse business.

Louisiana v. Southern Pacific Ry. Co., 52 La. Ann. 1822, 28 South. 372, is a case very much like the one at bar. In disposing of the case then before the court the Supreme Court of Louisiana

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said: "We are of the opinion that the defendant company is not authorized to receive for storage, for hire, in warehouses, goods or produce which have not been received by it under and from shipments by its road, or for shipments upon its road. We think it authorized to receive them for storage in warehouses under and from shipments upon its road, and for shipments by its road, to the extent that such storage is in fulfillment of its obligations as a common carrier, and not otherwise, and no longer. We do not consider that storage of such goods and merchandise by defendant in warehouses, for hire, is incidental to its business as a railroad corporation and common carrier, when the storage is made under either an express or implied, special or general, agreement with shippers or consignees, either before or at the time of shipment, or on receipt of goods, that they should be received and held for storage, for hire, either for a fixed time, or at the will of the shippers or consignees. We have already stated that permanence in the storage is, in our opinion, inconsistent with the idea of its being incidental to the operation of a railroad corporation, or necessary for its business as a common carrier. The fact that by availing itself of its control of switches, tracks, and superior terminal facilities defendant may offer special advantages and accommodations to shippers in storing their goods, and thereby obtain increased revenues as a corporation, is not at all determinative of the question whether the storage is incidental to its business as a railroad corporation, or the revenues received therefrom accrue to it as a common carrier. We think that the storage of goods by a railroad in its warehouses as a matter incidental to its business as such contemplates and looks to a rotation of storage as immediate and prompt as the railroad corporation can make it. If storage for hire be made by the railroad corporation, it should only be under an enforced storage resulting from the fact that shippers have failed to receive promptly, as they should do, the shipments carried over the road, and from this enforced storage the corporation itself should rid itself as quickly as possible. Inasmuch as the continuity of the relations between the parties have, by novation, been broken, and changed from those of shipper or consignee and common carrier to those of bailors and bailees, and the railroad company receives for the storage a consideration other than the regular freight rate, the storage takes on a different form and character from that which it would otherwise have, and becomes a substantive, independent, and not an incidental business. To be incidental business the storage must be preliminary, either to immediate transportation or immediate removal."

In the case of *State of Maryland v. Baltimore & Ohio Railroad Co.*, 48 Md. 49, the court, in discussing a similar question to the one now under consideration, used the following language:

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"And this brings us to the question, what are the buildings and works necessary and expedient to the operation of the road within the meaning of the appellee's charter? And here we are met with the argument that 'necessary' means buildings and works indispensable to the road. This, however, is not a mere dictionary question, but one involving the construction of a power granted to a railroad company to enable it to accomplish the objects for which it was chartered; and as used in this connection it is clear the Legislature meant such buildings and works as were reasonably convenient and appropriate to the maintenance and operation of the road. Construed in this sense, the question is whether 'necessary' buildings embraces the elevators, wharves, piers, and docks owned by the appellee. Now one of the main objects in chartering this company was to bring the western trade to the port of Baltimore, not merely to supply a local demand, but for the purposes of transshipment as ocean commerce. These buildings and structures are therefore necessary for the business of the appellee as a common carrier, for the purposes of receiving and storing grain and freight shipped over its road after the same have reached the place of destination, and previous to delivery to the consignee or owner. But the rights of the appellee in this respect are such as pertain to its functions as a common carrier, and as such it has no right to own and use the structures for the storage of grain and freight after the owner or consignee has had a reasonable time to remove the same. The act of 1826 does not certainly authorize the appellee to carry on the general and ordinary business of a warehouseman, and, however closely such business may be connected with that of a carrier, it is in no sense necessary to the exercise of the rights and privileges granted to the appellee as a railroad company."

In *Attorney General v. Great Northern Railway Co.*, 29 L. J. Ch. (N. S.) 794, Vice Chancellor Kindersley was called upon to determine whether dealing in coal by the railway company was illegal, because incompatible with its duties as a public carrier, and calculated to inflict an injury upon the public. It was there determined that the act of Parliament granting the charter to operate the railway implied a prohibition against the company's engaging in any other business, and the reason for the rule there laid down was thus expressed (page 798): "These large companies, joint-stock companies generally, for whatever purpose established, and more particularly railway companies, are armed with powers of raising and possessing large sums of money, large amounts of property, and, if they were to apply that money or that property to purposes other than those for which they were constituted, they might very much injure the interests of the public in various ways." The vice chancellor further said, on page 799: "If they can do that with regard to coal, what is to

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prevent their doing it with every species of agricultural produce all along the line? Why should they not become purchasers of corn, of all kinds of beasts, and of sheep, and every species of agricultural produce, and become great dealers in the supply of edibles to the markets of London? And why not every other species of commodity that is produced in every part of the country from which or to which their railway runs? I do not know where it is to stop, if the argument on the part of the company is to prevail. There is therefore great detriment to the interests of the public for this reason, taking merely the article of coal." The doctrine of this English case is quoted with approval in *New York, New Haven & Hartford Railroad Co. v. Interstate Commerce Commission*, 200 U. S. 361, 26 Sup. Ct. 272, 50 L. Ed. 515.

In the Matter of *Swigert*, 119 Ill. 83, 6 N. E. 469, this court had occasion to determine whether a grain elevator belonging to the Illinois Central Railroad Company, located on a lot of ground belonging to the company on the Ohio river and within the limits of the city of Cairo, was exempt from taxation for other than state purposes. The elevator was within 50 feet of the main track of the company's road leading into the city, and was connected therewith by sidetracks. It was so constructed as to receive and discharge grain both by rail and river. The elevator in question was leased by the company to Halliday Bros., who had the exclusive control of it. In holding that the elevator could not be exempt from taxation under the general power of the company to purchase, hold, and use all such real estate and other property as may be necessary for the construction of its railway and stations and other accommodations, which property, under the charter, was exempt from local taxation, this court, speaking by Mr. Justice Mulkey, on page 90 of 119 Ill., and page 473 of 6 N. E., said: "It [the warehouse or elevator in question] has no direct connection with the road or its operation, yet when shipments of grain are made either to or from it over the company's road, it is very clear the company can handle the grain thus shipped with more ease and greater facility, and hence can, by means of it, do a greater amount of business. But this is purely incidental, and falls far short of establishing the proposition that a vast elevator like this, costing \$200,000 or \$300,000, is a necessary appendage of a railroad, or that the Legislature, in granting the company's charter, intended to exempt such a structure from taxation. * * * As a mere carrier the company has no right to put a bushel of grain in it, except when directed to do so by the shipper or consignee. This necessarily results from the fact that all grain, as is shown by the testimony, is stored in it according to grade, and not according to ownership. * * * On the arrival of a consignment of goods the company

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has the right to at once store them in its own warehouse. The company is bound to carry grain in bulk and deliver the same from cars or other convenient place of storage without extra charge now just the same as it was before the elevator was built, if so required; and the company has no right to mix one man's grain with others, unless permitted to do so by the owners. It is clear, therefore, outside of the incidental benefits resulting to the company from a law of business rather than from any municipal regulation, the elevator has no necessary connection with the construction, maintaining, or operation of the company's road, and such being the case, it clearly does not come within the exemption. If the elevator was used exclusively by the company in receiving grain for shipment, or for storing it after shipment, without any additional charge therefor, except where the owner neglected to take it away within a reasonable time after its arrival, the property would then be clearly exempt from taxation. But such is not the case. Buildings used for the storage of grain for compensation are indifferently called warehouses, granaries, and elevators. Vast amounts of capital are invested in them, and, like railroads and other quasi public property, are under legislative control. Their construction and operation constitute a distinct business in the state of vast magnitude. They are a great convenience to the community in which they are situated, and particularly to the owners of the railways with which they are almost universally connected."

A similar question to the one decided in the foregoing case was decided in *Illinois Central Railroad Co. v. People*, 119 Ill. 137, 6 N. E. 451. In disposing of the question of exemption in the last case above cited this court, speaking by Mr. Justice Scholfield, on page 140 of 119 Ill., and on page 452 of 6 N. E., said: "That freighthouses, elevators, etc., constructed and used solely for the purpose of enabling the company to perform its duty as a common carrier, are exempt from taxation, we think is beyond question; but the company has no more authority, under its charter, to enter upon the business of warehousing, generally, than it has to enter upon that of merchandising, and property, therefore, devoted to such a use, not being within the contemplation of its charter, cannot be within the exemption."

While these two cases deal with the question of exemption from local taxation, the holding that the elevator was liable to taxation is based on the ground that the power to operate the elevator could not be sustained as implied or incidental to the power to own and operate a commercial railroad. We regard these cases as authorities against appellants' contention in the case at bar.

Appellants contend that the railroad company having devoted these elevators for a long term of years to use as public ware-

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houses, they have thereby become impressed with a public use, that is, with the right of the public to have that use continued. If this argument were limited to the duty of the railroad company to maintain these elevators for the use of shippers and buyers of grain who had for a long term of years enjoyed the right of temporary storage therein, and it were shown that such storage was in furtherance of the usual and ordinary business of transportation of grain, there would be more force in it. But the argument is not so limited. It goes to the full length of the right claimed by the prayer of the information. The fallacy in this contention consists in a failure to distinguish between the rights of the public and the rights of certain members of the Chicago Board of Trade. We have already pointed out that the public interest did not seem to demand the permanent storage of grain in regular public warehouses, and the issue of warehouse receipts in the manner and for the purposes provided by the rules of the board of trade. If all the public warehouses in Chicago of class A should cease to be regular, that is, cease to comply with the rules of the board of trade, by force of which their receipts would not be receivable on contracts for grain sold for future delivery, we are not prepared to say that any public injury would result. True it would no doubt affect the business of persons engaged in dealing in grain for future delivery. In no event can it be admitted that the railroad companies of the state owe any duty to the Chicago Board of Trade on the theory that the members of that corporation are the public, in the sense that property once devoted to a use which serves the purposes and convenience of the members of that exchange is thereby impressed with a public use, and cannot for that reason be withdrawn from such use.

It seems to us that the interest of the public is not so great in the outcome of this litigation as appellants' counsel seek to make it appear. From the year 1900 to 1906, both inclusive, the Illinois Central Railroad Company transported to Chicago 237,786,139 bushels of grain. During the same time the two elevators in question handled 13,280,000 bushels of grain, or about 5 per cent. of the total quantity transported by this railroad. If the elevators in question handled only 5 per cent. of the grain, the other 95 per cent. must have passed through this market without the use of these elevators. If the interest of the public requires that this railroad company shall maintain these two elevators, and if it is the duty of the railroad company, as an incident to the transportation of grain, to maintain these warehouses, then it logically follows that appellants should insist on the carrier building and maintaining an additional number of elevators sufficient in capacity to take care of the other 95 per cent. of the grain hauled. It is not even certain that all or any

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part of the 5 per cent. of the grain which actually passed through these elevators was hauled to market by the Illinois Central Railroad Company. While it is charged that these elevators are on the line of the Illinois Central Railroad, still it does not follow, and is not so charged in the information, that the grain was delivered to the elevators over this particular road. It is a fact so well known that we think it may be judicially noticed that in the regular course of business grain going to Chicago over any line of road may be readily switched, by means of the outer and inner belt lines, to any warehouse in any part of the city. It is therefore not impossible that a large part of the 5 per cent. of grain handled by these elevators may have come to the city over any one of the many lines of railroad centering there. However this may be, it is certain, under the facts averred, that 95 per cent. of the grain hauled to Chicago by the Illinois Central Railroad in the last seven years has not gone into either of the elevators in question. A similar condition exists in respect to the elevators on the other railroads against which informations are pending.

After giving the questions involved in this litigation that careful consideration which their importance seems to demand, our conclusion is that the information is entirely barren of facts upon which a decree granting the relief sought, or any other relief could be predicated.

The decree dissolving the injunction and dismissing the information for want of equity will be affirmed.

Decree affirmed.

WAGNER v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina, April 15, 1908.)

[61 S. E. Rep. 171.]

Carriers—Carriage of Passengers—Setting Down Passengers—Calling Stations—Invitation to Alight.*—On a station being called a passenger has the right to infer that the first stop will be such station, and on the train stopping it is an invitation to alight.

Same—Contributory Negligence—Riding on Platform.†—A passenger seated on the platform of a car with one foot on the bottom step

*For the authorities in this series on the question, what does, and does not, constitute an invitation to a passenger to alight from a car or train, see foot-notes appended to *Means v. Central R. R. (C. C. A.)*, 17 R. R. R. 97, 40 Am. & Eng. R. Cas., N. S., 97; foot-notes appended to *McGovern v. Interurban Ry. Co. (Iowa)*, 26 R. R. R. 242, 49 Am. & Eng. R. Cas., N. S., 242; *Sweet v. Birmingham, etc., Co. (Ala.)*, 22 R. R. R. 468, 45 Am. & Eng. R. Cas., N. S., 468.

† For the authorities in this series on the question whether it is

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and the other leg straight out, there being seats in the car, is negligent as a matter of law.

Same.—A passenger voluntarily riding on the platform, who alights from the train at a time and place which, if he had been inside the car, he would not have done, cannot recover for injury thereby sustained.

Same—Actions for Injuries—Question for Jury.—Where the conductor or other trainman failed to announce that the stop the train was then making was not at a station which had been called, whether a passenger riding on the platform had placed himself in such a position that he could not have heard the announcement that the stop was not at the station, if it had been given sufficiently loud to be heard by those inside the car held for the jury.

Same—Instructions.—In an action for injury to a passenger, the negligence charged was that the conductor or other trainman failed to announce that a stop the train was then making was not at a station which had been called. The court charged that, if the conductor or other trainman called a station and very soon thereafter the train stopped, and such announcement and stopping were reasonably calculated to lead an ordinarily prudent man to believe the train at the station, and if plaintiff did so believe and attempted to alight, and in so doing, without negligence, fell from the trestle, then defendant was liable. Held, that the instruction was erroneous as omitting any reference to plaintiff's position on the platform and its effect on his conduct in stepping off, also as omitting any reference to testimony in regard to announcement by the conductor to passengers inside the car that the stop was not at the station, and as withdrawing the pivotal question of the proximate cause of plaintiff's injury whether he had placed himself where he could not have heard the announcement if it had been given loudly enough to be heard by those inside the car.

Trial—Instructions—Cure of One Instruction by Another.—The instruction was not cured by another instruction that it might be that plaintiff heard the station called and still not be entitled to recover, in that the statute (Revisal 1905, § 2628) provides that, if a passenger shall be injured while on the platform in violation of regulations posted in the car, the railroad shall not be liable, if there was sufficient room inside, that it was plaintiff's duty to be inside, and that, if he was on the platform and heard the station called, yet, if the conductor announced that the stop was not at the station loud enough for those inside to hear, and plaintiff being outside did not hear, then defendant was not liable; such instruction having been given on the

contributory negligence in a passenger to ride on the platform of a street car, see foot-notes appended to *Ranous v. Seattle Electric Co.* (Wash.), 26 R. R. 621, 49 Am. & Eng. R. Cas., N. S., 621; foot-notes appended to *Coffey v. Omaha, St. Ry. Co.* (Neb.), 25 R. R. 599, 48 Am. & Eng. R. Cas., N. S., 597.

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independent contention advanced by defendant that, in compliance with the statute, notices warning passengers not to ride on the platform had been posted, and having no relation to the erroneous instruction.

Negligence—Question for Jury—Contributory Negligence.—That plaintiff was negligent, appearing from his own evidence, as a matter of law, that question should not be submitted to the jury, leaving the question of proximate cause to be decided either by the court or jury, as the evidence makes proper.

Carriers—Duty to Light Depots.†—Where a railroad, either for its own or for the convenience of its patrons, establishes quasi depots or stopping places, it must make them safe by providing lights at night.

Hoke, J., dissenting.

Appeal from Superior Court, Edgecombe County; W. H. Neal, Judge.

Action by D. D. Wagner against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. New trial.

Action for personal injury sustained by the alleged negligence of defendant. The testimony tends to show that the defendant corporation owns and operates as a part of its system a railroad from Plymouth to Tarboro, N. C., for the transportation of freight and passengers; that as said railroad approaches Tarboro from the east it crosses a bridge over the Tar river and the low grounds thereof. Plaintiff's witness Harris, who took measurements of the bridge, etc., says: "From stop post to beginning of trestle is 12 feet; from beginning of trestle to the bridge, 599 feet; width of the bridge, 9 feet 8 inches from guard rail to guard rail. Car steps would be over the guard rail. About a couple of inches of the guard rail would be showing. River bridge is 289 feet 7 inches; from end of bridge to crossing at Water street, to center of street 227 feet. From bridge to water, 35 feet 2 inches—it was low water. Total length from stop post to bank, 889 feet 3 inches; average height of trestle, 26 feet. From the embankment to the river there is swamp and undergrowth; trees on west side; no trees on east side. When the road crosses Water street the train stops to receive and put off passengers. It is called "Lower Tarboro." On the 2d day of June, 1905, plaintiff boarded the local freight train at a station eight miles east of Tarboro, between 7 and 8 o'clock at night, as a passenger for Tarboro. The train, with combination car and freight cars, was about 200 yards long. He took a seat on the

†See second foot-notes appended to *Illinois Cent. R. Co. v. Cruse* (Ky.), 21 R. R. R. 145, 44 Am. & Eng. R. Cas., N. S., 145.

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platform of the car. "One foot was on the lower step, and one leg straight out." The night was very dark. Plaintiff was in the habit of riding on this train "two to four trips a week"; was working at stations below Tarboro. He says: "The train blew for the crossing, then stopped for bridge, and just before getting to bridge the porter called out: 'Next stop Lower Tarboro.' As the train pulled up again I was sitting on platform. Train stopped again after pulling maybe 250 or 300 yards. I had gotten up when train stopped. When it stopped I got up and stepped off. Porter was in door by me when he called out: 'Next stop Lower Tarboro.' He then went back in baggage car." When it stopped, "stood there a second or two, thought I would go to upper depot, but thought of my wheel which I had left down town, and got off to get it." The train always stopped for the drawbridge. It then pulled up and stopped again at Lower Tarboro. "I never knew it to stop at this place before. * * * Conductor gave no notice that the train had not reached Lower Tarboro. It looked so to me. The light in the car was dim and blinded me. I carefully looked before stepping." He says: "I did not see anything there. I got off in the swamp. There were about six passengers on the car. It was warm, and I preferred riding on the platform." Plaintiff says that it was his custom to ride on the platform. No one spoke to him about it. Conductor knew he was on the train. The flagman and porter knew he was on the platform. Never saw any notice posted in car. He was seriously injured. Plaintiff introduced several witnesses whose testimony tended to corroborate him. Mr. Stewart, a witness for plaintiff, says: "There were plenty of seats. There was light in the car. Door was open. I don't think there was anything to prevent a man on the platform seeing between the cross-ties. On the steps near the end of the cross-ties a man could look down and see anything below. There was no light on the platform until conductor went out." Plaintiff says that he did not see conductor after he got on at Conetoe. Mr. Jenkins, a witness for plaintiff, testified that he had traveled on the car and with the door open and a light in the car. He thought a man could see that there was nothing between the cross-ties. Sam Taylor testified to same effect. Mr. Hill, the conductor for defendant, testified: "We stopped at the stop post, at the drawbridge, and pulled up again, and waited for an extra we were to meet there. Everything was quiet. I told the passengers to keep their seats. We had been there 5 or 10 minutes when I heard a lumbering. A man sitting behind me; and about that time some one said somebody had fallen off the train, and it turned out to be Wagner." Had plenty of seats. Did not hear any one call out: "Next stop Lower Tarboro." Had no porter. The flagman corroborated the conductor. Mr. Braswell, a passenger on the

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train, testified for defendant: That he saw plaintiff sitting on platform before reaching the trestle, and told him he had better go in, he would fall off, and plaintiff said he was where he generally rode. When the train stopped he heard the conductor say: "Keep your seats. You are not at Lower Tarboro yet." That no passengers came out on platform when train stopped. This witness said that plaintiff fell off. "He was not in a position to step off." The conductor testified that there were three signs in the car—one on each side and one on the end—which read: "Passengers are warned not to put their heads or arms out of the window or use the platform except on entering or leaving the car." He further said: "I do not know how it read, but it was a warning to passengers not to use the platform or stand on it." W. I. Walker and L. A. Hinson for defendant testified to the same effect. The foregoing sets forth substantially the facts upon which the rights and liabilities of the parties depend. The defendant, at appropriate stages of the trial, moved for judgment of nonsuit, and duly excepted to the refusal of the court to grant the motions. The issues submitted to the jury presented the inquiry as to whether the plaintiff was injured by the negligence of defendant, as alleged, and whether plaintiff was guilty of negligence which contributed to the injury. There was a verdict for plaintiff, with an assessment of damages. Judgment and appeal. The defendant's exceptions are set forth in the opinion.

F. S. Spruill and John L. Bridgers, for appellant.
Gilliam & Gilliam, for appellee.

CONNOR, J. Eliminating all immaterial and corroborative testimony, there is but little controversy respecting the facts. Plaintiff got upon defendant's train at a station eight miles east of Tarboro, between 7 and 8 o'clock in the evening of June 2, 1905, and took his seat on the platform of the combination car, "with one foot on the bottom step, and the other leg straight out." There were plenty of seats inside the car, and plaintiff sat on the platform because it was warm and he preferred riding there. There is no evidence that the conductor knew he was on the platform, although plaintiff says that "he knew I was on the train." The porter knew that plaintiff was on the platform. Plaintiff made "two to four trips every week. I was working at Parmelee, Bethel, and Conetoe," towns below Tarboro. As the train reached the stop post, at the approach to the trestle and bridge over the low grounds and the river, it stopped. As it moved forward the porter called out, "Next stop Lower Tarboro," and passed into the baggage car. By reason of an excursion train on the other or Tarboro side of the river going into a siding, the train, being an accommodation freight, "about

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150 or 200 yards long," stopped on the trestle about 250 or 300 yards from the stop or the post. The entire length of the trestle and bridge is 889 feet. From stop post to bridge is 611 feet. Before reaching the river the trestle is about 16 feet high. The conductor and other passengers were inside the car and remained therein. Up to this point the only matter in regard to which there is any controversy is the call by the porter: "Next stop Lower Tarboro." We assume, for the purpose of this decision, that plaintiff's version is correct. The conductor, who was inside the car with the other passengers, swears that when the second stop was made he said: "Keep your seats. We are not at Lower Tarboro yet." One passenger in the car corroborates the conductor. Two others say they did not hear him say anything. The latter says that he did not hear either call.

The defendant's witnesses testify that notices warning passengers from riding on the platform were posted inside the car. Plaintiff says that he never saw them; that it was his custom to ride on the platform. He also says that his residence was "near upper depot, about 300 yards to the west." He was uncertain whether to get off at Lower Tarboro, but decided to do so because he had left his wheel there. There is no evidence that he had a ticket, or that conductor or porter had any notice that he would get off at Lower Tarboro, or that any other passenger wished to do so. The night was dark. Plaintiff says that he stood up, looked carefully, thought he was at Lower Tarboro, that it was very dark, could not see that the train was on the trestle, and stepped off, falling to the ground, and sustaining serious injury. Stewart, plaintiff's witness, says: "About the time the train stopped the second time I heard somebody say, 'Hello,' and I heard a noise of something hitting the ground, and we all knew some one had fallen off, and somebody said it was Mr. Wagner, the contractor from Tarboro." His son, J. W. Stewart, testified to same. Hinson and Braswell for defendant say that plaintiff fell off. Mr. Stewart and other witnesses for plaintiff testified to effect of light from car upon the cross-ties. It is undoubtedly true, as contended by plaintiff, that: "The announcement by the conductor or other train employee of the station the train is approaching is the customary warning to passengers that the train is nearing the station, in order that they may get ready to alight. When a station is called, the passengers have the right to infer that the first stop of the train will be at such station; and when the train is stopped, it is an invitation to the passenger to alight." Moore on Carriers, § 34. Elliott on Railroads, § 1628, and many other authorities cited in plaintiff's brief. It will be observed, however, in the cases cited, the passenger was inside the car at the time the announcement was made, and, in consequence of it, went upon the platform to

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alight. This case is complicated by the fact, conceded by plaintiff, that he was voluntarily riding on the platform, there being "plenty of seats" on the inside of the car. It is not alleged, nor is there any suggestion, that it was negligent on the part of defendant to stop the train on the trestle. This was evidently necessary to permit another train to clear the track by going into a siding. The alleged, and the only possible, negligence was in the failure of the conductor, if there was such failure, or some other employee, to notify plaintiff that the train had not reached "Lower Tarboro." It was their duty to give such notice to passengers who were inside the cars. It may, under some circumstances, have been the duty to give such notice to persons standing or riding on the platform. If, for instance, the conductor or the porter knew that plaintiff, although negligently riding on the platform, intended alighting at Lower Tarboro, it would have been their duty to notify him. We find no evidence that either of them had such knowledge, or that the plaintiff himself had determined to stop there when he got on the train. He says that when the train stopped he stood a second or two, thought he would go to upper depot, but thought of his wheel, which he had left down town, and got off to get it. He lived near the upper depot. It does not appear that it was his habit to stop at the lower depot. We find nothing in the evidence imposing upon the conductor or porter any other duty to plaintiff than that which they owed to passengers inside the car.

Omitting, for the present, any reference to the alleged notices in the car, we proceed to consider the rights and duties of the parties in the light of the admitted facts. In *Goodwin v. Railroad*, 84 Me. 203, 24 Atl. 816, it was shown that plaintiff's intestate got upon the platform of the defendant's car. The conductor took his ticket, and made no objection to his riding there. The car was crowded, although there was ample standing room inside. The weather was warm. In going around a curve he was thrown from the platform and killed. In an action for damages, Emery, J., says: "The danger of standing on the narrow platform of a passenger car while the car is moving with the usual speed of railroad trains is most conspicuous. No prudent man, no man ordinarily mindful of his conduct and of matters about him, would occupy such a position." Referring to the reasons suggested for riding on the platform, the judge says: "All these circumstances may have made it more agreeable to ride on the platform in the open air than to stand inside the hot, crowded car but they did not in the least lessen the danger, nor the appearance of danger in so doing. That Goodwin was not ordered off the platform could not have led him to believe it was safe to ride there. He needed no warning of such a danger. He knew the place for passengers was inside the car. * * *

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Within the car, with all its discomfort, was safety. Without the car was obvious peril." In *Fletcher v. Railroad*, 187 Mass. 463, 73 N. E. 552, 105 Am. St. Rep. 414, it appeared that plaintiff was in the car. He left his seat some time before reaching his destination, went into the baggage compartment, and engaged in conversation with a baggage master who, when the train approached it for the purpose of stopping, called the station at which the plaintiff was to alight. After this, as the train was moving slowly, the plaintiff left the car and stood on the first of four steps that led from the platform of that end, and, while in this position, the steps came into collision with a truck, and he was injured. The court said: "Plainly, if he had remained in the car until the train stopped, this damage would have been avoided; but he voluntarily left a place provided for him as a passenger, and where he would have been safe, and exposed himself to the chance of injury, which common experience has shown is incident to standing upon the platform of a moving railroad car." In *Clark v. Railroad Co.*, 36 N. Y. 135, 93 Am. Dec. 495, Grover, J., said: "The negligence alleged against the plaintiff was that at the time of receiving the injury he was standing on the steps of the front platform of the car; it appearing that he would have escaped the injury either inside the car or upon the platform. In the absence of any explanation I should have no hesitation in saying that this position of the plaintiff at the time of the injury proved that he was negligent." In that case the evidence showed that the car was crowded. The question of negligence, under the circumstances, was left to the jury. In the note to this case it is said: "When a person is injured while riding in a dangerous position upon a railroad car, he is prima facie guilty of negligence, which will bar recovery, and the burden is on him to show the injury was not the result of his negligence." Fetter on Carriers of Passengers, § 167, says: "By the weight of authority, it is negligent, as matter of law, for a passenger to be upon the platform of a rapidly moving train, unless he is compelled to assume such position as the best he could do at the time, acting as a careful and prudent man. Elliott on Railroads, 1630. We are of the opinion that, taking plaintiff's testimony to be true, he was negligent, as a matter of law, in riding upon the platform in the manner described by himself.

The question, therefore, involved in the first issue, assuming that the porter called the station, and that the conductor failed to notify the passengers inside the car that the train had not reached "Lower Tarboro" when it stopped on the trestle, was such failure the proximate cause of the plaintiff's injury? In other words, if the jury should find that, if the conductor had made the announcement sufficiently loud to be heard by those inside the car, the plaintiff, being on the platform, could not have

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heard it, was such failure the proximate cause of the injury? While it is true that the authorities cited and many others examined by us relate to injuries sustained by persons thrown from the platform while the car is in motion, we can perceive no difference in principle in a case wherein the plaintiff, by voluntarily riding on the platform, alights from a train at a time and place which, if he had been inside the car, he would not have done. In both cases he is guilty of negligence, and, if but for such negligence he would not have sustained the injury, he cannot recover. The pivotal question, therefore, upon the first issue is, was the plaintiff injured by the negligence of the defendant? This involves two propositions—that defendant was guilty of a breach of duty to plaintiff, and that by reason thereof he was injured. As we have seen the duty which defendant owed plaintiff was to give notice inside the car that, notwithstanding the announcement of the porter, the train had not reached Lower Tarboro. If the jury found that the notice was given, they should have answered the issue "No." If they found, as we presume they did, that such notice was not given, the question was presented whether the failure to give it was the proximate cause of the plaintiff's injury; that is, had he placed himself in such a position that he could not have heard it if given sufficiently loud to be heard by those inside the car? This was a question for the jury. It was involved in the first issue, upon the essential element of proximate cause of plaintiff's conduct.

This brings us to a consideration of his honor's instructions. After correctly stating some of the general principles involved in the case, he read the issue, and said: "If the jury shall find as facts from the greater weight of the evidence that the conductor, brakeman, or other servant of the defendant company, whose duty it was to make such announcement, called out in the hearing of the passengers, and while the train was yet in motion, 'Next stop Lower Tarboro,' and very soon thereafter the train came to a full stop, and if the jury shall further find that such announcement and stopping of the train under the circumstances was reasonably calculated to lead an ordinarily prudent and careful man to believe that the train had in fact reached and stopped at 'Lower Tarboro' for the discharge of the passengers, and, further, that the plaintiff honestly believed from such announcement and stopping that the train had reached 'Lower Tarboro' and the place where he was to get off, and in this belief he attempted to get off the train, and in so doing, without negligence on his part, fell from the trestle and injured himself, then you will answer the issue (first) 'Yes.'" Defendant excepted. The instruction, containing a complete proposition, concluding with a direction to find a verdict for plaintiff if the jury found the facts involved in the proposition, omits any reference to plaintiff's position on the

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platform and its effect upon his conduct with reference to stepping off. It also omits any reference to the testimony in regard to the alleged notice by the conductor to passengers inside the car, and withdraws from the jury the pivotal question of the proximate cause of the conduct of plaintiff, making the answer to the issue to depend upon the call by the porter, plaintiff's belief that the train had stopped at the station, and his care in stepping off. The jury may well have found all of these conditions without concluding that the plaintiff was injured by defendant's negligence. There was evidence tending to show that the conductor gave the notice. It is true that it was controverted, but the defendant was entitled to have it submitted to the jury upon the issue. There was evidence that none of the passengers inside the car attempted to get off. The first issue could not be answered until either the court as a matter of law, or the jury, as a matter of fact, found, upon all of the evidence relating to the subject, that there was negligence on the part of defendant, and that such negligence was the proximate cause—the *causa causans* of the injury. In other words, conceding all of the testimony on behalf of plaintiff and so much of defendant's evidence as tended to sustain plaintiff's contention to be true, would plaintiff have been misled by the announcement of the porter, and the failure of the conductor to give the notice inside the car, if he had not been voluntarily on the platform? Viewed from any and every possible point of view, the plaintiff's right to have the first issue found for him depends upon the answer to this question. Assuming that it is, upon the evidence, a question for the jury, his honor inadvertently took it from them in the instruction, and made the answer to the issue to depend upon other findings. As we have seen, the plaintiff was negligent in being on the platform. He was injured while in that position. The burden is upon him to show that his injury was caused by the negligence of defendant. But one negligent act or omission of duty is charged—failure to give the notice that the train had not reached Lower Tarboro. The question, therefore, is, was there an omission of duty? If so, was it the proximate cause of the plaintiff's conduct whereby he was injured? Any instruction concluding with a direction to answer the issue should present these questions to the jury. His honor said to the jury in this instruction, if plaintiff, "without negligence on his part, etc." The jury may have understood his honor to refer to them the question whether being on the platform was negligence. It may be that his honor was referring to the manner in which he stepped off. His honor should have told the jury that being voluntarily on the platform was *per se* negligent. It is true that his honor in another part of the charge said to the jury: "It may be that the plaintiff Wagner heard a porter or

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some other authorized servant of the company announce, 'Next stop Lower Tarboro', and still he might not be entitled to a recovery, and for the following reasons: The statute, the aid of which is invoked in this case is section 2628, Revisal 1905. It was plaintiff's duty to be on the inside of the car. If you find from the evidence that the plaintiff was on the platform, that he heard the announcement that he says he heard, yet, if you further find from the evidence that the conductor Hill announced, 'This is not Lower Tarboro, keep your seats,' or 'hold your seats,' loud enough for the passengers whose duty it was to be on the inside of the car to hear it, and the plaintiff being on the outside of the car did not hear it, then the railroad company would not be liable, and you ought to answer the first issue 'No.' The statute is made for the protection of passengers as well as for the railroad company." This instruction was given upon the contention advanced by defendant that, in compliance with the statute, notices warning passengers not to ride on the platform were posted in the car. It involved the proposition, in regard to which there was controversy, that the notice required by the statute had been posted. It had no relation to the instruction to which the exception is pointed. The defendant was making this as an independent contention. His honor, in this instruction, imposed upon the defendant the duty not only to comply with the statute by posting the notice but that the conductor give the notice inside the car. This instruction did not cure the error involved in the other.

There are a number of other exceptions in the record, but one of which we deem it necessary to discuss, as they may not arise upon a second trial. His honor, upon the second issue, instructed the jury: "The burden of this issue, contributory negligence, is upon the defendant company. That is, the defendant is required to prove by the greater weight of the evidence that the plaintiff was guilty of negligence, and that such negligence was the proximate cause of the injury, in order for you to answer the issue (second) 'Yes'; and so, unless the defendant has shown by the greater weight of the evidence that the plaintiff was guilty of negligence, and also that such negligence was the proximate cause of the injury sustained by him, then the jury will answer the issue (second) 'No.'" Defendant excepts to this instruction, because the jury are told that it is required to show by the greater weight of the evidence that the plaintiff was guilty of negligence, whereas his honor should have instructed them, as a matter of law, upon plaintiff's own testimony that he was guilty of negligence, leaving only the question of proximate cause to them. It is elementary that the burden is upon the defendant to show contributory negligence, but it is equally true that if, upon the plaintiff's own evidence, he shows negligence as a matter of law, the question should not be left to the jury.

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It is the same as if defendant had, by its own evidence, shown negligence. The defendant would have the benefit of an instruction to that effect, leaving the question of proximate cause to be decided either by the court or jury, as the evidence makes proper. We have deemed it best not to discuss the exceptions directed to the instructions refused and given regarding the effect of section 2628, Revisal 1905. The correct construction of the statute is not clear, and in this case the questions arising upon it are not clearly presented. It may be well, upon a second trial, if the defendant so desires to present this defense, to set it up clearly in the answer to the end that an issue may be presented in regard to the notice in the car. The construction of the statute has been before this court in only one case (*Shaw v. Railroad*, 143 N. C. 312, 55 S. E. 713) in which there was a dissenting opinion, concurred in by two justices. The question of its application to a passenger who alights from a train under the circumstances attending this case presents interesting lines of thought. While we do not hold that it is necessary for the defendant to plead the statute as an affirmative defense, it will be observed that the nonliability of the carrier, when it is relevant, cannot well be presented under the general issue. It may be that, if the facts bring the case within its language, the fact that the passenger was injured "while riding on the platform of the car, * * * in violation of the printed regulations posted, etc.," confers immunity upon the carrier. How the words "riding on the platform" are to be construed in the light of the plaintiff's evidence, and to what extent this position of the plaintiff must contribute to his injury, are interesting questions. It is doubtful whether the language of the statute clarifies the subject. It seems to have been copied from other states. The somewhat variant views of the court are set out very clearly in *Shaw v. Railroad*, supra. It is impossible for us to say what, if any, effect was given the statute in the trial of this case. We have not thought it necessary to discuss several other questions, more or less clearly presented, because they may not arise upon a second trial. We must not be understood as intimating any opinions regarding the condition of the depot at Lower Tarboro, about which there is considerable evidence. If railroad companies, either for their own or for the convenience of their patrons, establish quasi depots or stopping places, they must make them safe—provide lights at night. The courts cannot relax the rule imposing this imperative duty. It is better to suffer some inconvenience than endanger life and limb. *Ruffin v. Railroad*, 142 N. C. 120, 55 S. E. 86. We do not perceive any connection between the condition of the depot at Lower Tarboro and plaintiff's injury.

For the errors pointed out, there must be a new trial.

HOKE, J., dissents.

VAN ORMAN *v.* LAKE SHORE & M. S. RY. CO. *et al.*

(Supreme Court of Michigan, March 31, 1908.)

[115 N. W. Rep. 968.]

Carriers—Carriage of Passengers—Personal Injuries—Actions—Evidence—Sufficiency.—Evidence held to sustain a verdict against two intersecting railroads for injuries to a passenger from a collision.

Same—Questions for Jury.—Whether each of two intersecting railroads was negligent in causing a collision in which a passenger was injured held for the jury notwithstanding the use of an interlocking device.

Same—Duty of Carrier—Intersection of Tracks—Safety Appliances—Effect.*—It is the duty of trainmen to watch for passing trains on an intersecting track notwithstanding an interlocking device, and, if they see danger, to use every precaution to protect their passengers by stopping their own train, if possible, in time to avoid a collision, whatever the cause of the approach of the train on the intersecting track.

Same—Actions for Injuries—Collisions—Questions for Jury—Change of Signals by Towerman.—Whether a towerman at an intersection of two railroads changed the signals to show a clear track to one train, after having signaled a clear track to another approaching train, held for the jury.

Same—Evidence—Admissibility—Order of Railroad Commissioner.—In an action against two intersecting railroads for injuries to a passenger from a collision, where the testimony shows conclusively that neither road regarded an order of the railroad commissioner fixing the speed at which the interlocker might be crossed, that the order was ignored by general custom, and that the engineer of the road seeking the introduction of the order knew of the custom, refusal to admit the order is not error.

Same—Materiality.—The order was immaterial and inadmissible in any event, where the liability of the railroad company depended on whether by the exercise of proper care the approach of the other train and the imminence of the collision could have been known in time to prevent the accident.

Same—Duty of Carrier—Degree of Care—Freight Trains—Comparative Degree of Care Required.†—The same degree of care is required

*For the authorities in this series on the subject of the duties and liabilities of a carrier of passengers with respect to collisions between trains or cars, see foot-notes appended to *Rodman v. North Jersey St. Ry. Co.* (N. J.), 14 R. R. R. 244, 37 Am. & Eng. R. Cas., N. S., 244, where all those preceding it are collected; *Chicago City Ry. Co. v. Schmidt* (Ill.), 21 R. R. R. 721, 44 Am. & Eng. R. Cas., N. S., 721.

†For the authorities in this series on the subject of the duties and liabilities of carriers with respect to passengers on freight trains, see foot-notes appended to *Rogers v. Choctaw, etc., R. Co.* (Ark.), 18 R. R. R. 592, 41 Am. & Eng. R. Cas., N. S., 592.

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in the operation of a freight train at an intersection of tracks as that required of a passenger train, since in either case human life is at stake.

Damages—Excessive Damages—Injuries to Person.—In an action for personal injuries, where all the evidence bearing on the question of damages is not in the record, but there is evidence of permanent disability and great suffering, a verdict for \$10,325 will not be held excessive.

Trial—Instructions—Sufficiency.—Where the theories of all the parties are explicitly stated by the court so far as sustained by the evidence, and the issues in the case and law applicable to them are definitely explained, the instructions are sufficient.

Same—Requested Instructions.—Where the theories of all parties are explicitly stated so far as sustained by the evidence, and requested instructions, so far as applicable, are given to the jury in an oral charge, it is sufficient.

Error to Circuit Court, Lenawee County; Guy M. Chester, Judge.

Action by Clayton M. Van Orman against the Lake Shore & Michigan Southern Railway Company and the Wabash Railroad Company for personal injuries from a collision of trains on intersecting railroads. From a judgment of \$10,325 against both defendants, defendants bring error. Affirmed.

The defendants' roads cross each other at right angles at Raisin Center, Lenawee county; the Lake Shore running north and south, and the Wabash east and west. On the night in question the Lake Shore was going north and the Wabash going west. The Wabash train consisted of 19 loaded freight cars and 10 empties, drawn by a 100-ton engine. The Lake Shore was a passenger train, consisting of a combination baggage and express car, a combination mail and smoker, and two coaches, drawn by a 50-ton engine. The crossing was a flag station, and the Lake Shore was running from 3 to 5 miles an hour, and was intending to stop. The freight train was running at a speed of 22 miles an hour or more. Plaintiff was a passenger on the Lake Shore road and was in the smoking car. He saw the light of the Wabash engine, and it seemed to him as though it was coming direct towards the car in which he was. He attempted to move in order to avoid danger, and just as he got into the aisle the impact came. He was thrown onto the back of a seat, hit by flying debris, and seriously injured. There was a standard interlocking plant at this crossing, which is conceded to have been in good condition at the time. This plant had been approved by the railroad commissioner, and by the order of the commissioner freight trains were allowed to pass the crossing at

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a speed of 8 miles an hour, and passenger trains at 12. There is evidence that the Wabash train was derailed at the derailer located 300 feet from the crossing, and that it passed over the ties and frozen ground until it reached the Lake Shore track, where it was struck by the Lake Shore engine between the cab and the rear of the tender. None of the cars of the Lake Shore were derailed except the front end of the baggage car. The Lake Shore engine, after the accident, lay partly on its side parallel to the Wabash track. Both the engineer and fireman of the Lake Shore were killed. Plaintiff sued both roads, claiming that each was guilty of negligence; the Wabash through its engineer's failure to observe the signals that the plant was at block against him, and the Lake Shore through its engineer's failure to keep proper watch for the Wabash train and avoid the accident by stopping before the intersection had been reached. Upon the trial it was developed that the Wabash claimed that the signals were first set by the towerman for a clear track to its train. If this was so, it must follow that he changed the signals and set the interlocker for the Lake Shore. Plaintiff was then permitted to amend his declaration alleging a third ground of negligence, to wit, the negligence of the towerman in changing the signals, claiming that the towerman was the agent of both roads, and that both were jointly and severally liable for his negligence. A general verdict was rendered against both defendants.

Argued before GRANT, C. J., and HOOKER, MOORE, CARPENTER, and McALVAY, JJ.

Herbert R. Clark, for appellant L. S. & M. S. Ry. Co.

Smith, Baldwin & Alexander, for appellant Wabash R. R. Co.

Charles E. Townsend and Bird & Sampson, for appellee.

GRANT, C. J. (after stating the facts as above). 1. There is no evidence that this interlocking plant was not in good condition. If it was in good condition, it could not possibly be set clear for one road and also open as to the other. It follows that some one seriously and negligently blundered, and that one or both of the defendants are liable to the plaintiff for the injuries he received. The plaintiff's case was easily made. On the trial the contest developed into strenuous efforts on the part of each defendant to cast the blame for the accident upon the other. As to the defendant the Wabash Railroad Company there is evidence that the interlocker was at block against its train; that the signals were properly set, and that its engineer disregarded them; that its train was derailed at the derailing point; that there were marks of the wheels over the ties from the point of derailment to the Lake Shore track; that the towerman saw the Wabash train going off over the derail; that he swung his lantern violently to call the attention of its engineer, but that his warning was

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disregarded; that the levers in the tower house after the accident showed that the plant was set for the Lake Shore to pass, and was at block against the Wabash. The defendant the Wabash Railroad gave evidence tending to show that it whistled to the towerman for the signals; that the signals were given by the towerman, and showed a clear track for its train; that its train was not derailed by the interlocker; that its engine and cars did not leave the rails until its engine or water tank was struck by the Lake Shore engine; and that it was well-nigh impossible for the towerman to change the interlocker in so short a time from signals for its train to signal against it and in favor of the Lake Shore. Sixty-five pages of the brief for the Wabash Railroad is occupied with excerpts from the testimony and argument to sustain its claim. It makes a strong but not conclusive case. The evidence is in sharp conflict. There is sufficient evidence to sustain a verdict that each defendant was guilty of the negligence charged against it. The jury were not asked to determine whether one of the defendants was guiltless and the other guilty. Both chose to submit the case to the jury for a general verdict. There being evidence from which it can legitimately be inferred that each contributed by its negligence to the accident, the verdict must be sustained against both. This conflicting evidence was sufficient to carry to the jury the question of its negligence.

2. To hold that the Lake Shore is free from fault would be to hold either that the engineer saw the Wabash train coming and did all in his power to stop his train before the collision, or else that, having the right of way, he was under no obligation to watch for trouble on the other road. His view was clear for a long distance, and he could easily have seen, had he looked, that the Wabash engine was within prohibited territory. The establishment of these interlockers does not operate as a guaranty that the train may pass with absolute safety when the engineer sees signals for a clear track. Human contrivances are not absolutely certain to avoid danger, and employees are not always careful. The use of appliances, compulsory or voluntary, to avoid danger, does not take away the duty of those using them to take all possible precaution to protect the lives and persons of those they have in charge. This obligation is not lessened by the adoption of mechanical devices which tend to obviate these collisions. There is evidence that the Lake Shore passenger train usually stopped to discharge or take on passengers before the engine had reached the Wabash track at the diamond or interlocker. There is evidence that, had the engineer seen the Wabash train approaching, he had ample time to stop his train, which was going very slowly, and avoid a collision. He owed to his passengers the highest degree of care. A railroad track is just as much a warning of danger to a train approaching on another

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road as it is to a traveler upon the highway, and it is the duty of the trainmen to watch for passing trains, and, if they see danger, to use every precaution to protect their passengers by stopping their own train, if it is possible to do so, in time to avoid a collision. *Pratt v. Chicago, etc., Ry. Co.*, 38 Minn. 455, 38 N. W. 356; *Schneider v. 2d Ave. Railway Co.*, 133 N. Y. 583, 30 N. E. 752. Thompson in his Commentaries on the Law of Negligence, vol. 2, § 1965, says upon this subject: "Clearly the engineer of the former train will not be justified in driving his train forward from the crossing, if it becomes reasonably apparent that those in charge of the train approaching on the other road are not going to stop; * * * but in such a case he must stop his own train before it reaches the crossing, if he can do so." Under these circumstances the negligence of the defendant the Lake Shore Company became a question of fact for the jury.

3. The towerman was the joint employee of both defendants. He had the entire control of this interlocker for both roads. His negligence is attributable to both. This position does not appear to be contested by either. The argument on the part of the defendant Lake Shore is that there was no evidence upon which to base a finding that the towerman changed the signals from the Wabash road to the Lake Shore road. It is not claimed that the signals did not show a clear track to the Lake Shore. The towerman testified positively that he set the signals at block against the Wabash and to show a clear track for the Lake Shore. Counsel for the Lake Shore strenuously argue that it was impossible for the towerman to change the signals after they had once been set for the Wabash. Either the engineer of the Wabash disregarded the signals or the towerman changed the signal, or the interlocking device was defective and showed a clear track to both trains. I do not think that there is any evidence that it was defective. If the jury believed the testimony of the engineer and fireman of the Wabash, there could not well have been a change; but we cannot say that it was impossible that the towerman first saw the Wabash train, and at a glance thereafter saw the Lake Shore, and promptly changed the signal. The jury were the proper ones to determine this question. They had the witnesses and all the facts and circumstances before them. This question, however, is of very little importance to the Lake Shore; for, whether the towerman did or did not change the signal, the duty of the engineer of its train to look for the Wabash train was the same. The duty to watch and stop its train, if the danger could have been foreseen, is the same whatever the cause of the approach of the freight train.

4. Error is assigned on behalf of the Lake Shore in that the court refused to permit them to read to the jury the order of the railroad commissioner approving the interlocker regulating

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the speed of trains crossing it. The objection to this was made by counsel for the Wabash road. The testimony conclusively shows that neither road paid any regard to the order of the commissioner of railroads fixing the speed at which their trains could cross this interlocker. A locomotive engineer of the Lake Shore road, with 34 years' experience, testified that it was the general custom of the trains upon that road to run over interlockers "just as fast as we were a mind to; sometimes 15, sometimes 25, and sometimes 40, miles an hour. The evidence on the part of both roads conclusively shows that this order of the railroad commissioner was ignored. It follows that the engineer of this train on the Lake Shore road was cognizable of this custom. The order of the commissioner, therefore, could not have operated as any excuse on the part of the engineer of the Lake Shore to lessen his obligation to watch for approaching trains. The order was inadmissible for another reason. The Lake Shore's liability on this branch of the case depended upon the question whether by the exercise of proper care he could have seen the approaching freight train, should have known that it was violating its signals, was liable to collide with his own train, and could have stopped his train in time to avoid it. This question is unaffected by the order of the railroad commissioner prescribing the speed.

5. It is urged on behalf of the Wabash Railroad that it was not under obligation to exercise so high a degree of care, having no passengers, as was the Lake Shore road with a passenger train. We think this claim is without merit. At these crossings a freight train is as apt to collide with a passenger train as with another freight train. In both human life is at stake. Those in charge of the freight train were therefore under obligation to exercise the same caution and care in approaching this crossing as were those in charge of the passenger train. Both train crews were under the like obligation. Each had the same opportunities for observation. Had the Wabash road complied with the order of the commissioner as to speed, no collision would have occurred.

6. Both defendants made motions for a new trial on which were reargued most of the questions now before us. In addition each asked for a new trial on the ground that the verdict was excessive. We have not before us all the evidence bearing upon the question of damages. Two physicians on behalf of the defendant Wabash road examined the plaintiff, and testified, but their testimony is not in the record. There was evidence of permanent disability and great suffering. We are entirely satisfied with the statements and conclusion of the circuit judge upon this point.

There are many other assignments of error upon the admission and rejection of testimony upon the refusal to give requests,

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and upon the charge of the court. They have all had due consideration. To discuss each question would take many pages, and would not be of service to the profession. The theories of all the parties, which there was evidence to sustain, were explicitly stated by the court to the jury. The requests, so far as applicable, were given to the jury in the oral charge, and the charge very definitely explained to the jury the issues in the case and the law applicable to them. It is sufficient to say that we find no error upon the record, and the judgment is affirmed.

HILL v. ST. LOUIS, I. M. & S. RY. CO.

(Supreme Court of Arkansas, March 30, 1908.)

[109 S. W. Rep. 523.]

Carriers—Injuries to Passengers—Premature Start—Negligence—Contributory Negligence—Question for Jury.—In an action for injuries to a passenger as he was endeavoring to alight from defendant's train by the premature starting thereof, evidence held to require submission of the carrier's negligence and plaintiff's contributory negligence to the jury.

Same—Termination of Relation.*—The relation of carrier and passenger ceases only after the train has reached the passenger's destination and he has had a reasonable time and opportunity to alight safely and to leave the carrier's premises.

Same—Reasonable Time—Question for Jury.—What is a reasonable time and opportunity for a passenger to alight safely and leave the carrier's premises is generally a question of fact for the jury.

Same.*—Plaintiff, after alighting from defendant's train at his destination, discovered that he had left his bankbook and papers on the seat, and on being assured by the brakeman, who was assisting passengers to alight, that he would have time to go back for the papers before the train started, went back, secured his package, and hurried to alight, and as he was attempting to do so the brakeman suddenly picked up his lantern and step box, and plaintiff fell or was knocked down and injured. It was the duty of the brakeman to assist passengers to alight, and signal the conductor when all the passengers for that station had got out of the car. Held, that plaintiff was still a passenger when injured, and though the carrier was not bound to hold the train in the first instance, the brakeman having granted plaintiff permission to re-enter the car, it was his duty to hold the train for a sufficient length of time to enable plaintiff to realight.

*See foot-notes appended to *Payne v. Illinois Cent. R. Co.* (C. C. A.), 26 R. R. R. 635, 49 Am. & Eng. R. Cas., N. S., 635; *Blomsness v. Puget Sound Elec. Ry.* (Wash.), 26 R. R. R. 640, 49 Am. & Eng. R. Cas., N. S., 640.

Hill v. St. Louis, etc., Ry. Co

Appeal from Circuit Court, White County; Jesse N. Cypert, Special Judge.

Action by E. P. Hill against the St. Louis, Iron Mountain & Southern Railway Company. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

J. H. Harrod, for appellant.

T. M. Mcchaffy and *J. E. Williams*, for appellee.

MCCULLOCH, J. Appellant, E. P. Hill, sued the railway company to recover damages for personal injuries received while he was attempting to alight from a passenger train, and on the trial of the case before a jury the court gave a peremptory instruction in favor of the defendant. The question, therefore, presented on the appeal, is whether the evidence, giving it the strongest probative force in favor of appellant's cause of action, is sufficient to warrant a verdict in his favor. The testimony tended to establish the following state of facts: Appellant was a passenger on one of appellee's trains en route from Little Rock to Beebe. When the train reached Beebe about 7 o'clock in the evening appellant stepped off, but immediately discovered that he had left a package containing his bankbook and other papers on the seat, and went back into the car to get them. Before doing so he spoke to the brakeman, who was standing at the steps assisting passengers to alight, and asked him whether he would have time to go back after his papers before the train started, and the brakeman replied that he would have ample time to do so. He went back into the car and secured his package, hurrying back as rapidly as he could, and as he attempted to alight the train started, and he was thrown down and injured. The brakeman suddenly picked up his lantern and step box just as appellant was in the act of stepping down on the box, and appellant fell or was knocked down. The duties of the brakeman while the train stood at the station were to assist passengers to alight, and to signal the conductor when all passengers for that station had gotten out of the car. These facts, if established by evidence, were sufficient to warrant a verdict in appellant's favor, and the case should not have been withdrawn from the consideration of the jury.

Appellant was still a passenger at the time he was injured, and was entitled to protection as such. The precise time at which one who rides on a train ceases to be a passenger is generally dependent upon the peculiar circumstances of each case, and it is difficult to lay down a rule on the subject applicable to all cases. The relation of carrier and passenger ceases only after the train has reached the passenger's destination and he has had a reasonable time and opportunity to alight safely and to leave the premises of the carrier. What is a reasonable time and op-

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portunity is generally a question of fact for the jury. *Barringer v. St. L., I. M. & Sou. R. Co.*, 73 Ark. 548, 85 S. W. 94, 87 S. W. 814; 2 *Hutchinson on Carriers*, § 1016. If a passenger, through forgetfulness in hurriedly debarking from a train, leaves a package in the car and re-enters for the purpose of getting it, he does not necessarily cease to be a passenger. He is still within his rights as a passenger in re-entering the car for that purpose, and does not become a trespasser in so doing. The carrier, it is true, is not bound to hold the train for a forgetful passenger to return for baggage or packages; but, when the passenger does re-enter the car for that purpose, there is a duty on the part of the carrier's servants in charge of the train not to start the train when he is in the act of alighting the second time, if such servant sees him about to do so, and, if he re-enters the car for that purpose by invitation or permission of the carrier's servant in charge of the train, then there is also a duty to give him a reasonable time and opportunity to secure his package and alight from the car. The evidence in this case tends to show that the brakeman had control of the train temporarily to the extent that the conductor took signals from him when all passengers for the station had alighted. This placed him in control of the time allowed passengers to debark, and they had the right to rely upon any assurance given as to the length of time the train would remain at the station. It, therefore, because the duty of the brakeman, after he had assured appellant that he had ample time to go back into the car for his package, not to signal the conductor until appellant came out. In other words, the brakeman by his assurances to appellant extended the time given for debarkation, and a premature starting of the train after then, whereby appellant was injured, rendered the carrier liable. The brakeman's position as guardian of the entrance to the car, with authority to notify the conductor when all was ready to start the train, carried with it the authority to give assurance to a passenger that the latter would have reasonable time in which to re-enter the car for the purpose named; and, if he signaled the conductor before the passenger had reasonable time to alight, or failed to take steps to prevent the starting of the train, the carrier is liable for any injury caused by it.

The question whether or not the passenger had been guilty of contributory negligence in remaining in the car too long, or in attempting to alight from the moving train, is, of course, to be considered. We think the question should have been submitted to the jury under proper instructions.

Reversed and remanded.

HOGNER v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, April 2, 1908.)

[84 N. E. Rep. 464.]

Carriers—Carriage of Passengers—Who Are "Passengers."*—One becomes a passenger on a railroad when he puts himself into the care of the company to be transported under a contract, and is received and accepted as such by the company; and, while the relation is commonly to be implied from circumstances, these must be such as to warrant an implication that the one has offered himself to be carried, and the other has accepted his offer and received him; and, where the existence of the relation is in controversy, the question is whether the person has presented himself in readiness to be carried under circumstances in reference to time, place, manner, and condition that the company must be deemed to have accepted him as a passenger.

Same—Street Railways—Effect of Forcing Way onto Car.*—In the case of a street railway, the relation of carrier and passenger is seldom created by express contract, and whether it has begun is generally to be shown by the circumstances; but it must at least appear that the passenger has offered himself and that the offer has been accepted, and, while the carrier ought to consent where there is no reasonable objection, it does not necessarily follow that it has consented or will consent in any particular case, for it may decline to accept an offered passenger without a good reason, and in such case one cannot become a passenger by forcing his way upon the car against the carrier's will, but his remedy is for damages for unwarrantable exclusion.

Same—Ejection of Passengers—Actions—Questions for Jury—Existence of Relation.—In an action against a street railway company for forcible ejection, whether plaintiff was a passenger held, under the evidence, for the jury.

Exceptions from Superior Court, Suffolk County; J. B. Richardson, Judge.

Action by Richard Hogner against the Boston Elevated Railway Company. Judgment for defendant, and plaintiff excepts. Exceptions overruled.

Edgar O. Achorn, for plaintiff.

Sughrue & Chase and *Robert M. Bowen*, for defendant.

*See generally, foot-notes appended to *Karr v. Milwaukee, etc., Co.* (Wis.), 25 R. R. R. 623, 48 Am. & Eng. R. Cas., N. S., 623; foot-notes appended to *Radley v. Columbia Southern Ry. Co.* (Ore.), 12 R. R. R. 153, 35 Am. & Eng. R. Cas., N. S., 153; *Lexington Ry. Co. v. Herring* (Ky.), 25 R. R. R. 635, 48 Am. & Eng. R. Cas., N. S., 635.

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HAMMOND, J. This is an action of tort in which the plaintiff seeks to recover damages for being forcibly removed from one of the defendant's cars after he had boarded it. The declaration contains two counts, in each of which the assault is alleged to have been committed while the plaintiff was "attempting to board * * * [the car] * * * to ride upon the same as a passenger for hire."

As is usual in such cases the evidence as to the details was conflicting. The evidence introduced by the plaintiff tended to show that by reason of a surgical operation which had been recently performed upon his back, from the effects of which he had not fully recovered, he was somewhat infirm; that upon his signal the car stopped for him with the rear platform right in front of him; that he took hold of the "grab handle" and got upon the lower step; that there were three or four passengers in the vestibule; that he asked one of them to let him take hold of the switch box, saying he was a sick man and needed to help himself up in that way; that they only laughed at him; that with both feet still on the lower step he asked the conductor, who was standing "half way in the rear opening and leaning forward," for permission to take hold of him, saying to him, "I am a sick man and have a sore back and do not dare to bend the back," that the conductor said to him, "You are not sick, you do not appear as a sick man," and ordered him off; and that he the plaintiff was forcibly removed from the lower step to the ground by the conductor and motorman.

The evidence for the defendant tended to show as follows:

"That the plaintiff signaled the car at Townsend street and swung on while the car was still in motion. When the plaintiff had so swung on and was standing on the lower step, he made motion to a passenger who was standing between the controller and the step to move over, at the same time uttering some incoherent words which the conductor and passenger could not fully understand about his sick back. He finally grabbed hold of the coat of this passenger, who had refused to move from his position, and opened two or three buttons of his coat. The conductor then asked what the trouble was and told the plaintiff to come into the car off the step. The plaintiff rode from Townsend street to Marcella street on the lower step of the car holding onto the grab irons. During this time the conductor repeatedly told the plaintiff that he 'could not ride there but must get on or get off.'

"The evidence further showed that this happening took place during the rush hours, and that the conductor offered to assist the plaintiff, but that the plaintiff repulsed all offers. Although repeatedly told that he could not ride on the step and he must either get on or off, the plaintiff paid no attention to the con-

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ductor's requests. It further appeared that there was plenty of room for him to enter the car and plenty of seats inside. The plaintiff during all the time he was on the car remained on the lower car step in violation of the rules of the company and refused to get on or off, and stood so that no one could enter or leave the car. When the car approached Marcella street the plaintiff having refused to enter the car or come off the step, the conductor gave three bells for an immediate stop and called for assistance to remove the plaintiff. The plaintiff was again asked to get off the step or get on the car, and still refused.

"The motorman of this car and the motorman of the second car behind came to the conductor's assistance and asked the plaintiff to obey the conductor's requests and avoid any trouble. The plaintiff still refused and was removed. After they got the plaintiff down into the street, they removed him to a position about in the gutter. The plaintiff grabbed hold of the conductor and struck at him with an umbrella. The car then proceeded."

One of the questions was whether the plaintiff had become a passenger. "One becomes a passenger on a railroad when he puts himself into the care of the railroad company to be transported under a contract, and is received and accepted as a passenger by the company. There is hardly ever any formal act of delivery of one's person into the care of the carrier, or of acceptance by the carrier of one who presents himself for transportation, and so the existence of the relation of passenger and carrier is commonly to be implied from circumstances. These circumstances must be such as to warrant an implication that the one has offered himself to be carried on a trip about to be made, and that the other has accepted his offer, and has received him to be properly cared for. * * * A railroad company holds itself out as ready to receive as passengers all persons who present themselves in a proper condition, and in a proper manner, at a proper place to be carried. It invites everybody to come who is willing to be governed by its rules and regulations. In a case like this, the question is whether the person has presented himself in readiness to be carried under such circumstances in reference to time, place, manner and condition that the railroad company must be deemed to have accepted him as a passenger." Knowlton, J., in *Webster v. Fitchburg R. R.*, 161 Mass. 298, 299, 300, 37 N. E. 165, 24 L. R. A. 521. The relation of carrier and passenger is created by contract express or implied. In the case of a street railway company it is rarely created by express contract when the car is boarded by the passenger from the street. Whether the relation has begun is generally to be shown by the circumstances. But however shown, it must appear at least that the passenger has offered himself and has been accepted. It is not enough that he has offered himself. The acceptance by the

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carrier is needed. It is true that the carrier ought to consent where there is no reasonable objection. Still it does not necessarily follow that it has consented or will consent in any given case. For no good reason it may decline to accept the offered passenger; and in such case he cannot become a passenger by forcing his way upon the car against the will of the carrier. His remedy is by way of damages for the unwarrantable exclusion. These principles are too familiar to require the citation of authorities in their support.

Upon the evidence the question whether the plaintiff was a passenger, was for the jury. If the evidence for the defendant was believed, the jury might find that neither by the motorman nor by the conductor was the plaintiff recognized as a proposed passenger, much less accepted as such; but that the plaintiff, without the knowledge of either, got upon the step of the car while it was in motion, and that the conductor, as soon as he saw him, refused to accept him as a passenger unless he would get above the lower step where he was standing; and that the plaintiff refused to accept this condition. If such was the case, the jury might well find that the contract of carriage never had been made, or in other words, that the plaintiff never become a passenger. The plaintiff, relying upon cases like *O'Brien v. Bennett*, 8 Car. & P. 724; *Gordon v. West End St. Ry.*, 175 Mass. 181, 55 N. E. 990, and *Smith v. St. Paul City Ry.*, 32 Minn. 1, 18 N. W. 827, 50 Am. Rep. 550, strongly contends that as matter of law the plaintiff became a passenger as soon as he got upon the step. In all those cases, however, it appeared that the car or vehicle had stopped in obedience to a signal from the proposed passenger. In other words, the passenger had offered himself and been accepted; and the act of getting upon the step was an act done in pursuance of the contract. These and similar cases cannot be regarded as authorities in support of the proposition that upon the evidence in this case the plaintiff became a passenger as soon as he stepped upon the car.

Upon an examination of the charge to the jury it appears that the court stated the law in accordance with the principles above set forth; and, while the illustrations were somewhat graphic, and while some of the expressions of the court when considered apart from their setting might seem to be misleading, yet that when the charge is considered as a whole and these expressions are considered in their proper setting, the court fairly left the case to the jury upon correct instructions and made no error in law.

Upon the whole evidence the questions also as to whether the plaintiff, whether or not a passenger, was removed from the car for proper cause and in a proper manner, were left to the jury upon instructions not erroneous in law.

Exceptions overruled.

HINES v. BOSTON ELEVATED RY. CO.

(Supreme Judicial Court of Massachusetts, Suffolk, April 4, 1908.)

[84 N. E. Rep. 475.]

Carriers—Injury to Passenger—Negligence.*—Though the guard urges passengers to speed in getting into a car of an elevated train, and a passenger within, standing by the door, holding to a rod, has her hold loosened by passengers passing by her, and her hand slips and the tip of a finger gets into the jamb of the door, and while it is there the guard closes the door onto it, there is no negligence, making the carrier liable for the injury; it not being shown that the guard saw or should have seen the position of the finger, or that he should have reasonably anticipated it, or that the hasty entrance of passengers urged by the guard would result in any injury to plaintiff.

Report from Superior Court, Suffolk County; John A. Aiken, Judge.

Action by Mary Hines against the Boston Elevated Railway Company. There was a verdict for plaintiff, and the case is reported for the determination of the Supreme Judicial Court. Judgment for defendant.

Coakley, Coakley & Sherman, and *M. A. Sullivan*, for plaintiff.

Choate, Hall & Stewart, for defendant.

HAMMOND, J. At the time the plaintiff and her mother and young brother entered the car, which was the second or third car of the train, it "was somewhat crowded, but there was room enough for the plaintiff's mother to sit down and for [two adult persons] to sit down next to her, then there was just room enough to put the boy on the end of the seat next to the center door. By that time the seats were crowded. After the plaintiff's companions were seated, the plaintiff stood in front of the boy (and held him right there until the crowd commenced to come in). His left hand was toward the center door, that is, he was toward the rear of the train from the center door, and at that time there were not many passengers standing in the car, although there were some. * * * From the time the plaintiff boarded the train until it reached Haymarket Square, she stood right near the rear of the center door through which she entered the car, but at no time did she have hold of a strap. As the train proceeded toward Haymarket Square, passengers got in at

*See extensive note, 4 R. R. R. 227, 27 Am. & Eng. R. Cas., N. S., 227.

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the first stations and the car filled up gradually, although the plaintiff noticed nothing unusual about the number of people in the car until she got to Haymarket Square. At Haymarket Square there were a large number of people on the platform, as there had been at each station at which the train stopped, but when the train reached Haymarket Square there was not much spare room in the car in which the plaintiff was riding. When the plaintiff took her position near the rear end of the center door, she was standing in the main aisle of the car in front of the very end of the seat which runs alongside of the car, reaching over the seat, holding on to the round rod that is at the side of the door. This rod is a perpendicular wooden rod about an inch or an inch and a half in diameter, with iron braces. This the plaintiff grasped with her right hand, and stood in this position from the time she boarded the train until it stopped at Haymarket Square, and the door near which she was standing was opened."

As to the accident the plaintiff testified that upon arriving at Haymarket Square "they opened the door to let passengers on, and they were getting on as quick as possible, and then the guard took them by the armful and pushed them in on top of the others—just took them and pushed them in. * * * The car was all crowded at that time." She further testified that she "should judge" that as many as 15 people came by her as she was standing at the door with her hand upon the rod. In answer to the question as to the effect of the pushing upon her, she said: "Somebody first leaned on my back, and then on my arm, and then I slipped, and I put my hand to protect the child, and then the door was shut. I had my hand on the iron rod, and when they pushed on me, my hand slipped and went in there (indicating), and I held my hand there for protection, and it was then that they banged the door." She also testified that the place where she placed her hand as above indicated was "the jamb of the door," and that "the handful that he pushed in front of me was that jarred my hand loose." When the door was "banged to" by the guard, one of the fingers of her right hand was injured, "right from the nail above the first joint."

Passing over the question of the plaintiff's due care, we see in all this no evidence of negligence of the defendant. The accident occurred at about 8 o'clock on a summer evening, and it is apparent that a great many people were at the various stations; and while a reasonable time should be given to passengers within which to board the train, yet it is proper to urge them. We do not think that the guard whose business it was to close the door could have reasonably anticipated that the hasty entrance of the passengers would result in any harm to the plaintiff. Nor was the act of shutting the door a negligent act. He saw that

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all the passengers were in, and he had no reason to anticipate that any passenger already in would place a hand on the jamb of the door. Only about half an inch of the end of one of the plaintiff's fingers was there, and it is not shown that the guard saw or ought to have seen it. It was his duty to shut the door as soon as practicable. The case differs widely from *Carroll v. Boston & Northern St. Ry.*, 186 Mass. 97, 71 N. E. 89. In that case the attention of the conductor had been attracted to the plaintiff because he had been talking with him only a moment before the accident, was close to him, and must have seen him in the doorway. It was said in that case that "the jury were warranted in finding 'that the conductor knew, or, if he had exercised due care would have known, that the plaintiff's thumb was in the slot. There was evidence that he was standing facing the plaintiff, not more than 12 inches away from him, and that the plaintiff's hand was about opposite his face.'" In that case the accident occurred upon an ordinary electric street car, and on that account it was said in the opinion that "the custom which exists in England of having the doors of railway carriages on steam railroad shut by the guard from the outside just before the train starts, makes the English cases relied on by the defendant of no value here."

But it is manifest that the English cases have a material bearing as to the law to be applied to the present case. See, among others, *Maddox v. London, Chatham & Dover Ry.*, 38 L. T. (N. S. 458; *Richardson v. Metropolitan Ry.*, L. R. 3 C. P. 374; *Metropolitan Ry. v. Jackson*, 3 App. Cas. 194.

Judgment for the defendant.

FISHER v. NORTHERN PAC. RY. CO.

(Supreme Court of Washington, April 10, 1908.)

[94 Pac. Rep. 1073.]

Carriers—Carriage of Goods—Loss of Goods—Liability as Carrier.*

—Where a consignee of goods shipped over defendant's line called for them and was told that they were there, but could not be delivered to him until the next day, and were destroyed by fire that night, defendant's liability was that of a carrier; the warehouseman's liability not commencing till after the consignee, acting with reasonable promptness, has had a chance to remove the goods.

Appeal from Superior Court, Yakima County; H. B. Rigg, Judge.

Action by T. R. Fisher against the Northern Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

B. S. Grosscup and Ira P. Englehart, for appellant.
Snyder & Luse, for respondent.

MOUNT, J. This case was tried to the court without a jury. Findings were made in favor of the plaintiff, and a judgment was entered against the defendant for \$368.19. The defendant appeals.

The facts are as follows: The respondent was doing business in North Yakima in this state. In May, 1906, three boxes of merchandise, of the value of \$368.19 were shipped from Portland, Or., over the line of the appellant, to the respondent at North Yakima. The goods arrived at North Yakima about noon on May 5, 1906. About the time the goods arrived the plaintiff called at the depot for them. He was informed that the goods were probably in the shipment of that day, but that the waybills were not made out, and would not be made out on that day. Plaintiff did not return for the goods on that day. During the afternoon the goods were unloaded from the car and placed in the warehouse of the railway company. At about 11 o'clock of

*For the authorities in this series on the question as to when a common carrier's liability, as such, on account of freight terminates after its arrival at destination, see foot-notes appended to *Stapleton v. Grand Trunk Ry. Co.* (Mich.), 9 R. R. R. 332, 32 Am. & Eng. R. Cas., N. S., 332, where all those preceding it are collected; foot-notes appended to *Central of Georgia Ry. Co. v. Jones* (Ala.), 25 R. R. R. 109, 48 Am. & Eng. R. Cas., N. S., 109; *Kicht v. Wrightsville & T. R. Co.* (Ga.), 23 R. R. R. 605, 46 Am. & Eng. R. Cas., N. S., 605; *Brunson & Boatwright v. Atlantic Coast Line R. Co.* (S. Car.), 23 R. R. R. 19, 46 Am. & Eng. R. Cas., N. S., 19.

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that night a fire started in the warehouse known as "Coffin Bros.' warehouse," about 100 feet from the freighthouse of the railway company where the goods in question were stored. The North Yakima city fire department was unable to control the fire, and it spread to, and consumed, the warehouse of the railway company, and the goods stored therein were lost. It is conceded that there was no negligence on the part of the railway company. Upon these facts the appellant argues that it is liable only as a warehouseman, and not as a carrier. This presents the only question in the case.

Many authorities hold that, where goods are shipped by rail and arrive at their destination, and are there unloaded into a warehouse and held ready for delivery, the company's liability ceases as a common carrier, and it is thereafter liable as a warehouseman only. See note to *Denver, etc., Ry. Co. v. Peterson*, 97 Am. St. Rep. 76, 90, where many of the cases cited by the appellant are mentioned. But the rule is stated in note "e," p. 91, of the same volume, as follows: "* * * Merely placing the goods in storage at their destination does not, in our opinion, reduce the carrier's liability to that of a warehouseman. Its liability as carrier continues, according to the sounder reason and the weight of authority, until at least such time as the consignee has had a reasonable opportunity to inspect the goods, and take them away in the usual course of business." Several cases are then cited which support this rule. The author continues: "This doctrine applies both to carriers by rail and to carriers by water. But the consignee must act with reasonable expedition. If he fails within a reasonable time and after a fair opportunity to take charge of the goods, the carrier's liability becomes that of a warehouseman only." And many cases are cited to support this rule. We think the rule as quoted above under note "e" is the rule which should apply in this case. It was substantially followed by us in *Normile v. Northern Pacific Railway Company*, 36 Wash. 21, 77 Pac. 1087, 67 L. R. A. 271. When the respondent called for his goods he was informed in substance that they could not be delivered to him until the next day. They were destroyed that night. He, therefore, had no opportunity to obtain the goods or to take them away before they were destroyed. Under these facts and the rule above stated the liability of the appellant was that of a carrier, and not of a warehouseman.

The judgment must therefore be affirmed.

HADLEY, C. J., and CROW, FULLERTON, and ROOT, JJ., concur.

OGLES v. NASHVILLE, C. & ST. L. RY. CO.

(Supreme Court of Georgia, March 27, 1908.)

[60 S. E. Rep. 1048.]

Contracts—Right of Action—Privity.—A. paid his own money to a railroad agent, for which the agent agreed to issue a railroad ticket and cause it to be delivered at a distant place to B., the married daughter of A., to be used by B. in traveling over the road of the agent's principal in coming to the home of A. The agent failed to issue the ticket, or to cause a ticket to be issued and delivered, to B. Because of a failure to receive the ticket, B. was delayed in making the trip, and suffered injury. Suit was instituted against the railroad company by B. for damages alleged to have resulted from a breach of contract. Held, that there was no privity of contract between B. and the railroad company, and that the petition was open to general demurrer.

(Syllabus by the Court.)

Error from Superior Court, Floyd County; Moses Wright, Judge.

Action by Lilly Ogles against the Nashville, Chattanooga & St. Louis Railway Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Sharp & Sharp and *W. M. Henry*, for plaintiff in error.

Dean & Dean, for defendant in error.

ATKINSON, J. This is a suit for damages. In her petition the plaintiff alleged that the defendant was a railroad company, with an agent in Rome, Ga.; that defendant's line of road connected at Marietta with the road of the Louisville & Nashville Railroad Company, which operated a line of railroad through Canton, Ga.; that the two companies were connecting carriers, and had traffic arrangements with each other, by which each company was authorized to sell tickets and transportation over the entire line between Rome and Canton; that on August 7, 1906, petitioner's husband was in Rome, Ga., where he had gone to live, and where she intended to go and join him; that petitioner was boarding at the time in Canton, Ga., and had no money with which to pay her board, or to pay her railroad fare from Canton to Rome; that she was unwell, and unable to work and take care of herself, and for that reason it was necessary that she go to her husband, at the home of her father, in Rome, Ga.; "that on said date petitioner's father went to the defendant in Rome, and stated to this defendant there that he wished to buy a ticket for

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his daughter, your petitioner, from Canton, Ga., where she then was, to Rome, Ga.; that then and there the defendant agreed to sell and furnish such ticket for petitioner's transportation from Canton to Marietta, Ga., by way of said line of Louisville & Nashville Railroad Company, and from Marietta to Rome over said line of defendant, and said Martin [petitioner's father] then and there paid to the defendant \$2.42 in full payment for such ticket and transportation for petitioner, and for her use and benefit, and the defendant accepted such payment, and then and there agreed with said Martin, and undertook, in consideration of such payment, to at once, or within three hours, transmit to Canton, through the agent of the said Louisville & Nashville Railroad Company at that point, such ticket for petitioner, or to secure for her such transportation from Canton to Rome; that the defendant, when it accepted such payment and undertook to furnish transportation, well knew where petitioner was, as well as for whose benefit said agreement was so made and money was so paid, and to whom such transportation was to be so furnished, and thereupon it owed the petitioner the duty to diligently do as it so agreed and undertook to do for her benefit, and to promptly and diligently transport her from Canton to Rome;" that the defendant failed to transmit the ticket, and on account of such failure the plaintiff, while in a delicate condition, was obliged to remain in Canton, and on account thereof suffered injury, more at length described in the petition. The defendant demurred to the petition, among other grounds upon that of the failure to set forth a cause of action. Upon the hearing the demurrer was sustained, and the petition dismissed, and the plaintiff excepted, assigning error upon the judgment.

Under the allegations of the petition (which must be construed most strongly against the pleader), Martin, the father of the plaintiff, entered into a contract with the agent of the defendant in Rome by which the agent undertook to issue a ticket for transportation, and to cause the same, through the railroad agent at Canton, to be delivered to the plaintiff, whose whereabouts in Canton the defendant's agent at Rome knew. Thus far there were but two parties to this agreement, the plaintiff's father and the defendant. It is not alleged that the plaintiff's father was acting as the agent of the plaintiff in making this contract. If it had been intended to make such an allegation, such intention should have been expressed, and not left to inference. In this respect the case is different from *Seifert v. Western Union Tel. Co.*, 129 Ga. 181, 58 S. E. 699. It is alleged that there was a breach of this contract by failure to issue the ticket and by failure to furnish the plaintiff with transportation. The effect of such allegations was to allege a breach of the contract between the plaintiff's father and the defendant. Clearly any right

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of action thereunder for injury arising from breach of this contract was in the plaintiff's father, who made it. Had the contract been so far executed by the defendant as to issue a ticket and deliver it to the plaintiff, the plaintiff, by virtue of holding the ticket, might have been introduced as a party, and for a breach of duty thereafter occurring might recover, under the ruling in *Georgia, C. & N. Ry. Co. v. Brown*, 120 Ga. 380, 47 S. E. 492, and *Aiken v. Southern Ry. Co.*, 118 Ga. 118, 44 S. E. 828, 62 L. R. A. 666, 98 Am. St. Rep. 107. But, under the allegations, the breach occurred before the establishment of any relation between the plaintiff and the railroad company, and consequently the petition was open to demurrer.

Judgment affirmed. All the Justices concur.

PECOS VALLEY & N. E. RY. CO. v. HARRIS.

(Supreme Court of New Mexico, Feb. 25, 1908.)

[94 Pac. Rep. 951.]

Carriers—Freight Rates—Contracts for Reduction.—It is beyond the power of either a railroad company or a shipper to make a valid contract for a less rate than the public schedule filed with the Interstate Commerce Commission, and notwithstanding such a contract the liability of the shipper is the rate so published and filed.

Appeal from District Court, Chaves County; before Justice Edward A. Mann.

Action by Pecos Valley & Northeastern Railway Company against F. H. Harris. Judgment for defendant, and plaintiff appeals. Reversed and remanded.

W. C. Reid, for appellant.

PARKER, J. This was an action brought by the appellant for the recovery of the amount of freight due from the appellee upon a shipment of freight from Kansas City, Mo., to Roswell. The appellee secured from the appellant a bill of lading, which classified the freight as "an emigrant outfit," while the contention was made that the freight was in fact "a grader's outfit." The court below tried the case upon the theory that, if the appellee had obtained from the appellant a contract for the shipment of the goods, the contract furnished the measure of recovery, notwithstanding the same may have been for a less rate than that established by the appellant and filed with the Interstate Commerce Commission, as required by the federal statute. This was erroneous. It is beyond the power of either a railroad company

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or a shipper to make a valid contract for a less rate than the published schedules filed with the Interstate Commerce Commission, and notwithstanding a contract of this kind, the measure of liability of the shipper is the rate so published and filed. *Railroad v. Mugg & Dryden*, 202 U. S. 242, 26 Sup. Ct. 628, 50 L. Ed. 1011, 24 R. R. R. 91, 47 Am. & Eng. R. Cas., N. S., 91.

For the reasons stated, the judgment of the court below is reversed, and the cause remanded, with instructions to award a new trial and proceed in accordance with this opinion.

MILLS, C. J., and POPE, McFIE, and ABBOTT, JJ., concur. MANN, J., having tried the case below, did not participate in this decision.

MELTON v. BIRMINGHAM RY., LIGHT & POWER CO.

(Supreme Court of Alabama, Nov. 14, 1907. Rehearing Denied Dec. 19, 1907.)

[45 So. Rep. 151.]

Carriers—Passengers—When Relation Terminates.*—The relation of a street car passenger does not end when he leaves the car, but continues until he has reasonable opportunity to leave the carrier's roadway, after the car reaches the place to which he is entitled to be carried.

Same—Alighting Passenger—Negligence.—Where a street car passenger on a dark night signaled the conductor to let her off at a regular stopping place, and the conductor understood, but failed to let her off there, and let her off beyond, where the track was very rough, and while attempting to cross the track fell and was injured, the company was negligent, entitling her to recover, unless she was guilty of contributory negligence in crossing the track, or unless she assumed the risk.

Same—Evidence—Sufficiency.—In an action for injury to a street car passenger, a plea that she assumed the risk by voluntarily and knowingly alighting between stations, appreciating the danger of doing so, was unsupported, where the evidence showed that the passenger, with the conductor's assistance, alighted from the car before she knew she was beyond her destination, or between that station and the next one.

Appeal from City Court of Birmingham; C. W. Ferguson, Judge.

Personal injury action by Susie R. Melton against the Birmingham Railway, Light & Power Company. From an order

*See last foot-note appended to *Blomsness v. Puget Sound Elec. Ry.* (Wash.), 26 R. R. R. 640, 49 Am. & Eng. R. Cas., N. S., 640.

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granting defendant a new trial on verdict and judgment for plaintiff, plaintiff appeals. Reversed and rendered.

Denson & Denson, for appellant.

Tillman, Grubb, Bradley & Morrow, for appellee.

DENSON, J. This is an action by a passenger against a common carrier to recover damages for a personal injury alleged to have been sustained by the passenger through the negligence of the carrier's servants in and about the carriage of the passenger. The cause was tried on pleas of the general issue, contributory negligence, and assumption of risk. There were verdict and judgment for the plaintiff for \$500, and from an order granting the defendant a new trial the plaintiff has taken this appeal.

We think there can be no doubt of the soundness of the proposition that the relation of passenger does not terminate when the passenger leaves the car, but continues until he has reasonable opportunity to leave the car and roadway of the company, after the car reaches the station or stopping place to which he is entitled to be carried. This is the generally accepted doctrine. *Montgomery Street Railway Co. v. Mason*, 133 Ala. 508, 527, 32 South. 261; *Sellers' Case*, 93 Ala. 9, 9 South. 375, 30 Am. St. Rep. 17; *Van Ostran v. New York, etc., R. R. Co.*, 35 Hun, 590, 595; *Hutchinson on Carriers* (2d Ed.) § 615. Nor do we think that it can be the subject of serious doubt that if the plaintiff, while traveling on one of the defendant's cars on a dark night, signaled the conductor to put her off at a particular street crossing (a regular stopping place), and the conductor understood the signal, but failed to put her off at that crossing, and put her off at a place beyond such crossing, where the company's track was ballasted with slag and was very rough, and that the plaintiff, while attempting to cross the track to go to her home, which was on the side of the track opposite the point where she alighted from the car, fell, and by the fall suffered the injury complained of, this would constitute actionable negligence, entitling the plaintiff, under either count of the complaint, to a recovery, unless she was guilty of contributory negligence in making her way across the track, or unless she assumed the risk. See authorities cited supra; *Houston & Tex. Cent. R. R. v. Smith* (Tex. Civ. App.), 32 S. W. 710; *Id.* (Tex. Civ. App.) 33 S. W. 896.

The evidence without conflict shows that the car was stopped beyond the street signaled for, that it was a very rough place at which the stop was made, that the conductor aided the plaintiff in alighting from the car, and that in making her way across the track plaintiff fell and suffered the injury complained of. We are of the opinion that the evidence fails to afford a reasonable inference that the plaintiff, in her efforts to cross the track,

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was guilty of negligence which contributed to her injury. In this view, unless there is evidence to support the third plea—that of assumption of risk—the court should not have set aside the verdict. That plea is in the following language: “And for further plea and answer to each of the counts in the complaint, separately and severally, defendant says the plaintiff voluntarily assumed the risk of said alleged injury, in this: Plaintiff voluntarily alighted from the car of the defendant between the stations with the knowledge of the fact, and with an appreciation of the danger in doing so.” Issue was joined on this plea, so the applicability of the doctrine of assumption of risk to cases of this kind is not before us. The evidence, however, without conflict and without affording a reasonable inference to the contrary, shows that the plaintiff, with the assistance of the conductor, had alighted from the car and was on the ground before she was aware of the fact that the car was beyond the Seventy-Second street crossing, or between Seventy-Second and Seventy-Third streets; so that, even if it should be conceded that the conductor proposed to plaintiff, after she had been put on the ground, to carry her on to Seventy-Third street (which, it may be granted, was as convenient for the plaintiff’s purposes as was Seventy-Second), yet it cannot be said that the alighting of the plaintiff under the belief that the car had stopped at Seventy-Second street was voluntary, in the sense in which it is alleged in the plea; i. e., with the knowledge that the car was between the stations. Therefore the plea is not supported by the evidence, and furnished no ground for the order setting aside the verdict. *L. & N. R. R. Co. v. Johnson*, 79 Ala. 436; *L. & N. R. R. Co. v. Coulton*, 86 Ala. 129, 5 South. 458.

It follows that the court was not warranted in setting aside the verdict, either on the ground of error in the refusal to give the special charges requested by the defendant, or on the ground that the verdict was contrary to the evidence; and the order setting aside the verdict and granting a new trial must be set aside and annulled, and the verdict and judgment rendered for the plaintiff will stand intact in the court below.

Reversed and rendered.

TYSON, C. J. and SIMPSON and ANDERSON, JJ., concur.

ZECCARDI v. YONKERS R. CO.

(Court of Appeals of New York, Dec. 20, 1907.)

[83 N. E. Rep. 31.]

Carriers—Carriage of Passengers—Care Required of Carrier—Assaults by Employees.*—A carrier is an absolute guarantor of the safety of its passengers against the assaults of its employees while it is performing its contract of carriage.

Same—Commencement and Termination of Relation.†—A passenger during his journey may alight from the car without losing his status as a passenger.

Same—Personal Injuries—Assaults by Employees.*—Plaintiff was a passenger on defendant's car. The conductor quarreled with another passenger, plaintiff's friend, over the payment of fare, and the latter was ejected from the car, whereupon he and the conductor engaged in a fight upon the ground; the car being stopped at the time. Plaintiff knew not what the fight was about, but stepped out to separate the men, when the motorman took hold of him and knocked him down and punched him. Subsequently the conductor charged plaintiff in a police court with having assaulted him, and plaintiff was acquitted. Held, that defendant was not liable for the motorman's assault on and the false charge against plaintiff; his injuries having been occasioned during his voluntary intervention in a quarrel as to which defendant owed him no duty.

Chase and Hiscock, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Vincenzo Zeccardi against the Yonkers Railroad Company. From an order of the Appellate Division (99 N. Y. Supp. 936), reversing a judgment entered on a nonsuit, defendant appeals. Order reversed, and judgment affirmed.

Charles F. Brown, for appellant.

F. X. Donoghue, for respondent.

PER CURIAM. The plaintiff was a passenger on the defendant's car. The conductor became involved in an altercation with an-

*See foot-notes appended to *St. Louis, etc., Ry. Co. v. Dowgiallo* (Ark.), 25 R. R. R. 145, 48 Am. & Eng. R. Cas., N. S., 145.

For the authorities in this series on the question whether a railroad company can be held liable on account of arrests or prosecutions made or instigated by their employees or agents, see foot-notes appended to *Canon v. Sharon, etc., Ry. Co. (Pa.)*, 25 R. R. R. 379, 48 Am. & Eng. R. Cas., N. S., 379; *Schmidt v. New Orleans Rys. Co. (La.)*, 24 R. R. R. 156, 47 Am. & Eng. R. Cas., N. S., 156.

†See preceding case and foot-note.

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other passenger, a friend of the plaintiff, about the payment of fare. That passenger was ejected from the car, and he and the conductor were engaged in a fight outside of the car upon the ground; the car being stopped at the time. The plaintiff testified: "The conductor and the other fellow were in the crowd. I did not know what the quarrel was for. When the car stopped, I went over to separate the fight. Before I could reach those two men the motorman took hold of me and knocked me down and punched me." Subsequently the conductor charged the plaintiff, in a police court, with having assaulted him. The plaintiff was acquitted. For the assault and false charge the plaintiff sues the defendant railroad company.

We are of opinion the company was not liable. A carrier is an absolute guarantor of the safety of its passengers against the assaults of its employees while it is performing its contract of carriage. *Stewart v. Brooklyn & Crosstown R. R. Co.*, 90 N. Y. 588, 43 Am. Rep. 185. It is also true that a passenger, during his journey, may alight from the car without losing his status as passenger. *Parsons v. N. Y. Central & H. R. R. Co.*, 113 N. Y. 362, 21 N. E. 145, 3 L. R. A. 683, 10 Am. St. Rep. 450. In this case, however, the wrongs for which the plaintiff seeks redress were suffered when the plaintiff entered upon an enterprise totally disconnected with the carriage. His intervention to end the quarrel which was taking place on the street between the conductor and the other passenger may have been, and doubtless was, on his statement, praiseworthy; but it occurred neither on the defendant's car, nor on its property, and was a matter wholly foreign and disconnected with the defendant's contract of carriage. The fact that one of the combatants was the defendant's conductor did not alter the relation the defendant would have borne to it, had it been a contest entirely between strangers. Had the plaintiff been assaulted for trying to alight from the car or trying to again obtain entrance in it, a very different question would be presented. His injuries were occasioned during his voluntary intervention in a quarrel, as to which the defendant owed him no duty. He, doubtless, should recover from the person who inflicted the wrong; but he cannot hold the defendant liable.

The order of the Appellate Division should be reversed, and the judgment entered upon the nonsuit affirmed, with costs in all courts.

CHASE, J. (dissenting). Four men, including the plaintiff, boarded one of the defendant's cars at Yonkers to go to Fordham. It was an open car, and three of the men, not including the plaintiff, sat together upon one of the cross-seats. The plaintiff sat on a seat behind the other three. Before reaching Fordham an altercation arose between one of the men, other than the

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plaintiff, and the conductor of the car in regard to the amount of change returned by the conductor from a bill tendered by the man in payment of his fare. The man in dispute with the conductor attempted to stop the car, and he rang the bell several times. The conductor then attempted to eject him. The car was stopped, and the motorman came to the conductor's assistance, and together they pulled him from the seat. In the affray the conductor's pocket was torn and the money in his pocket was scattered on the floor of the car. After the man was dragged from the car a fight ensued on the ground by the side of the car. The plaintiff did not in any way take part in the controversy or the fight. The only testimony affecting the plaintiff is given by himself, and it is as follows: "I do not know what the quarrel was for. When the car stopped, I went over to separate the fight. Before I could reach those two men the motorman took hold of me and knocked me down and punched me, and while I was on the ground still he struck me. I was kind of dazed, and they took me and put me in front of the extra car and brought me to the police station in Yonkers." It does not appear that the plaintiff struck or took hold of any one. After the plaintiff had been knocked down by the motorman, the conductor and motorman carried him to another car, on which he was detained, and subsequently taken back to Yonkers, where a criminal charge was made against him for an assault.

Whatever may be the truth about this controversy, it now appears without contradiction from the fragmentary and very unsatisfactory record that the plaintiff was wholly free from any fault or intentional wrong. He not only did not engage in the fight, but he had no intention of engaging in the fight. Without an avowed or apparent intention of abandoning his journey or his rights as a passenger, he temporarily stepped from the car for the purpose of separating the conductor and a fellow passenger who were engaging in the fight and thus preventing the car from proceeding on its journey. Can it be true that, if a person temporarily steps from a car to aid in removing an obstacle from the track or in properly releasing an employee of the railroad company from enforced detention, he thereby loses the right to be carried in the car to his intended place of destination? The plaintiff's complaint was dismissed by the court without a motion made therefor by the defendant and before the plaintiff had presented all of his testimony. If a new trial had been taken herein, it is very possible that it would have resulted in showing the whole matter in a very different light; but it does not appear from the facts as they are now presented that the plaintiff disobeyed any rule of the railroad company. He did not interfere with the defendant's servants or so conduct himself as to justify the assault upon him or his detention. If the plaintiff retained

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his identity as a passenger, and the relation of carrier and passenger continued between the plaintiff and defendant, the defendant is liable for the battery and for the improper detention. *Stewart v. Brooklyn & Crosstown R. R. Co.*, 90 N. Y. 588, 43 Am. Rep. 185; *Dwinelle v. N. Y. C. & H. R. R. Co.*, 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611; *Palmeri v. Manh. R. Co.*, 133 N. Y. 261, 30 N. E. 1001, 16 L. R. A. 136, 28 Am. St. Rep. 632; *Gillespie v. Brooklyn H. R. R. Co.*, 178 N. Y. 347, 70 N. E. 857, 66 L. R. A. 618, 102 Am. St. Rep. 503.

It was the defendant's duty to safely carry the plaintiff as a passenger to his destination. Instead of carrying him to destination, he was by the defendant's servants forcibly prevented from continuing his journey, and forcibly put upon a car in which he was taken in the opposite direction from that desired by him. On the facts as they now appear the plaintiff had not as a matter of law so lost his identity as a passenger as to justify the dismissal of his complaint. *Parsons v. N. Y. C. & H. R. R. Co.*, 113 N. Y. 355, 362, 21 N. E. 145, 3 L. R. A. 683, 10 Am. St. Rep. 450.

The order should be affirmed, and judgment absolute ordered against the appellant on the stipulation, with costs in all courts.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, HAIGHT, and VANN, JJ., concur with per curiam opinion. HISCOCK, J., concurs with CHASE, J.

Ordered accordingly.

TAYLOR v. ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina, Dec. 4, 1907.)

[59 S. E. Rep. 641.]

Carriers—Carriage of Passengers—Injuries—Protection of Passengers Leaving Station Premises.*—The rule that, where a passenger has reached his destination and alighted, he is still entitled to protection as a passenger until he has had a reasonable time to leave the station premises, applies strictly to injuries resulting from any instrumentality or agency under the carrier's control.

Same.†—A carrier is not liable for injuries to a passenger from the conduct of third persons on the station premises, unless it knew of

*For the authorities in this series on the question whether a person is a passenger after he alights from a train or street car at his destination, see preceding case and foot-notes.

†For the authorities in this series on the subject of the duty of the carrier to protect its passengers against strangers, see foot-notes appended to *Dufur v. Boston & M. R. Co. (Vt.)*, 9 R. R. R. 711, 32 Am. & Eng. R. Cas., N. S., 711; foot-notes appended to *Hillman v. Georgia R. & B. Co. (Ga.)*, 22 R. R. R. 766, 45 Am. & Eng. R. Cas., N. S., 766.

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the existence of the danger or of circumstances from which the danger might have been reasonably anticipated.

Appeal—Review—Questions of Fact—Amount of Damages.—The Supreme Court has no jurisdiction to reverse a judgment on the ground that it is excessive.

Same—Discretion of Lower Court—Continuance.—Motions for a continuance are within the discretion of the trial court, except in rare cases, and will not be reviewed on appeal.

Evidence—Weight and Sufficiency—Scintilla of Evidence.—A scintilla of evidence is any material evidence that, if true, will tend to establish the issue in the mind of a reasonable juror.

Carriers—Carriage of Passengers—Actions for Injuries—Sufficiency of Evidence.—Evidence in an action by a passenger who was carried by her station, and who alleged that on her return and while leaving the cars she was surrounded by a drunken crowd, who pushed against her and abused her with menacing speeches, using profane language, held not to support a verdict for plaintiff.

Damages—Mental Suffering.†—Recovery cannot be had for mental suffering in the absence of bodily injury, except under the mental anguish statute, with reference to telegraph companies.

Appeal from Common Pleas Circuit Court of Colleton County; Charles G. Dantzler, Judge.

Action by Emily Taylor against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed and remanded for a new trial.

W. Huger Fitzsimons, for appellant.

Griffin & Padgett, for respondent.

JONES, J. The complaint alleges that plaintiff at Charleston, S. C., on the night of June 12, 1904, boarded defendant's train from Charleston to Savannah as a passenger for Green Pond, S. C., to visit a sister who was ill and lived a few miles from said station; that the conductor was informed of her anxiety to reach her sister, and was requested to notify her of arrival of the train at Green Pond; that no notice was given her that her station was reached, and that no call of the station was made; that, in consequence, she was carried by her station to Yemassee, but was there transferred to defendant's return train and carried back to Green Pond; that her brother-in-law was at the station to meet her when she was carried by, but, upon learning that she had not gotten off, returned to his home, three miles distant. The

†See foot-notes appended to *Bahr v. Northern Pac. Ry. Co.* (Minn.), 24 R. R. R. 782, 47 Am. & Eng. R. Cas., N. S., 782; *Lindsay v. Oregon Short Line R. Co.* (Idaho), 24 R. R. R. 616, 47 Am. & Eng. R. Cas., N. S., 617; foot-notes appended to *Chicago Con. Traction Co. v. Schritter* (Ill.), 24 R. R. R. 442, 47 Am. & Eng. R. Cas., N. S., 447.

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remainder of the complaint is as follows: "That upon arriving at said station at Green Pond, and while leaving the cars thereat, this plaintiff, in the presence of the employees of the defendant company at the depot of said station, was surrounded by a drunken crowd of colored people, who violently pushed and jostled her and abused her with menacing speeches, using profane, violent, and obscene language, and that one of the employees of the defendant company ran off, telling plaintiff that he was going for his pistol in order that he might protect this plaintiff, and at the same time leaving her alone in the midst of a great throng of negroes and never returned, and plaintiff was carried to a house a distance of at least 200 yards by a colored woman, where the plaintiff begged to be cared for during the night, and was given lodging. That as a result of the wanton, gross, and reckless conduct of the defendant, Atlantic Coast Line Railroad Company, utterly disregarding the rights of the plaintiff in wantonly and recklessly carrying plaintiff by the station for which her ticket called, and to the station at which she requested to be put off, without so notifying her or without giving any of the notices usually given of the arrival of trains at said station informing passengers of their destination, and in not protecting plaintiff from the indignities placed upon her after her arrival at Green Pond depot, from Yemassee, or by not taking her to some place of safety for the night, thereby causing great mental and nervous shock and anxiety, to this plaintiff's injury and to her damage \$10,000. Wherefore plaintiff prays judgment for the sum of \$10,000 damages and costs." The jury within a few minutes after leaving their seats rendered a verdict for \$10,000. A motion for a new trial was made and refused.

The court, after instructing the jury that it was the duty of the railroad company to exercise the highest degree of care to protect a passenger, charged that a passenger, after having reached his destination, is a passenger until he has had a reasonable time to get away. It is contended that this instruction was erroneous in view of the fact that the gravamen of the complaint was for failure to protect from indignities placed upon her by third persons after she had left the car at her destination, and that it should have been qualified so as to subject the carriers to the highest degree of care to protect a passenger from third persons on the station premises when the carrier had reasonable ground to apprehend such danger. The charge was not incorrect as a general proposition, but as applied to the particular case in hand it was incorrect and misleading. When one is on the carrier's station premises with a bona fide purpose of becoming a passenger, within a reasonable time before the departure of the train to be boarded, he is entitled to protection as a passenger. *Johns v. Railway Co.*, 39 S. C. 162, 17 S. E. 698, 20 L. R. A.

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520, 39 Am. St. Rep. 709; *Hammond v. Railway Co.*, 15 S. C. 10. As a corollary of this rule, when a passenger has reached his destination and alighted from the train, he is still entitled to protection as a passenger until he has had a reasonable time to leave the station premises. 4 Elliott on Ry. § 1592; *Brunswick, etc., Ry. Co. v. Moore*, 101 Ga. 684, 28 S. E. 1000; *Glenn v. Lake Erie, etc., R. R. Co.*, Ind. 659, 75 N. E. 282, 2 L. R. A. (N. S.) 872, 12 Am. St. Rep. 255. This rule applies strictly when injury results from any instrumentality or agency under the control of the carrier. But, when the injury results from the conduct of a fellow passenger in the course of transportation, knowledge of the existence of the danger or of circumstances from which the danger may have been reasonably anticipated is necessary to fix a liability upon the carrier for damages sustained in consequence of failure to guard against it. *Franklin v. Railway Co.*, 74 S. C. 340, 54 S. E. 578; *Anderson v. Railway Co.*, 77 S. C. 436, 58 S. E. 149. If this be the rule as applied to an injury from a fellow passenger during the course of active transportation, there is quite as great, if not greater, reason for holding such to be the law when the injury is alleged to have resulted from strangers upon the station premises.

It is further contended that there should be a new trial (1) because the complaint was solely for vindictive damages and there was no evidence to sustain such action; (2) because the verdict is so manifestly against the evidence and excessive that it was an abuse of discretion to refuse a new trial; (3) because defendant was prejudiced in the trial by the absence of a material witness, defendant's motion for continuance for that cause having been refused. As this court has no jurisdiction to reverse a judgment on the ground that it is excessive, and as motions for a continuance are within the discretion of the trial court, except in rare cases, we will not further notice the second and third grounds of objection. But, after a painstaking examination of the testimony, we fail to find even a scintilla of evidence to support such a verdict. A scintilla of evidence is any material evidence that, if true, would tend to establish the issue in the mind of a reasonable juror. The complaint is for willful misconduct, and it is essential that there be evidence of wantonness or willfulness as alleged. Notwithstanding the positive statement of the conductor that he called the Green Pond station twice, on this inquiry, we must accept as true the statement of plaintiff and her two friends with whom she was conversing as the train passed Green Pond that they heard no such call and that none was made. According to the plaintiff's testimony, when the conductor was informed that she had been carried by her station, the conductor stated that he had helped "old lady" or "a crippled lady" off at Green Pond, and had forgotten her. The undisputed evidence showed that the

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train was the Sunday excursion train from Charleston to Savannah, and on this occasion there were eight coaches, three for white passengers and five for colored passengers, the regular conductor, Capt. Symmes, being in direct charge of the coaches for colored passengers, and Capt. Seyle as assistant conductor being in charge of the coaches for white passengers, in one of which plaintiff rode. The coaches were crowded with passengers. The train reached Green Pond at 9:27 p. m., made the usual stop, taking on and putting off passengers, among those getting off being an old lady, Mrs. Grant, who was assisted by Conductor Seyle. When the conductor discovered that plaintiff had been carried by her station, she was assured that she would be returned to Green Pond on the next train. At Yemassee, 14 miles from Green Pond, she was transferred to train No. 22 from Savannah to Charleston, and returned without charge to Green Pond, the train arriving at 10:54 p. m., a delay to plaintiff of only 1 hour and 27 minutes. The evidence of plaintiff's witnesses shows that plaintiff was treated with every reasonable consideration and courtesy by the agents of defendant while she was on board the trains, except in so as a breach of duty might be inferred from a failure to call the Green Pond station or notify plaintiff of arrival there; but the only inference possible from the facts as stated by plaintiff is that this failure was a mere inadvertence under the stress of the circumstances. The consequences of this failure of duty were not serious, a mere loss of a short time, the inconvenience of extending her trip to Yemassee and back, and the anxiety reasonably involved in passing her station under the circumstances. Although the complaint alleged that plaintiff's brother-in-law was at the station to meet her on arrival of train from Charleston and returned home because she did not get off, there was no evidence whatever on that subject. After leaving the train at Green Pond, she secured the services of a negro woman, who was in the employ of Mrs. Grant who kept a boarding house, and was escorted to the boarding house, where she lodged for the night. There was no evidence that she would have reached her sister's bedside any sooner if she had disembarked at Green Pond on arrival of train from Charleston, and there was no evidence that the failure to leave the train at Green Pond in the first instance deprived her of any protection she would otherwise have had. The verdict, therefore, should not stand because of any conduct connected with the failure of the conductor to call the Green Pond station. After stating that the conductor introduced her to Mr. Hughes at Yemassee, and told her he was the agent at Green Pond, that he would put her in his charge and send her back on the next train, that is plaintiff's version of what took place when she left the train at Green Pond: "A. We went on the platform together,

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and there was an abusive crowd of darkies there, and they were using awful language, such as I have never heard before, and I hope and pray I never will again, and he just said to them, 'Boys be quiet, there is a lady here.' Q. Miss Taylor, what happened then, if anything, on the platform? A. He stayed there a short time, sir, and begged me to excuse him, and said he was going to get a pistol and come back and protect me, and he left. Q. Where did he go? A. In the office. That is where I think he went. Q. Did you ever see him any more that night? A. I did not. Q. Were you touched in any way by those negroes that night? A. I should think I was. After he left me, I was completely unnerved. However, I did try to make my way around the crowd, and the result was I would only catch against the negro men, first one and then another; and that is exactly what I underwent. After being confident, I made my way through the crowd, and got a negro woman to carry me to a boarding house. Q. Where? A. To Mrs. Grant's." There is nothing in this testimony tending to show the allegations of the complaint. No one threatened, abused, molested, assaulted, or injured her. She merely touched, "caught against" some of the negro men as she made her way through the crowd at night. There is no suggestion that they purposely subjected her to any personal indignity. The crowd of excursionists and their friends were doubtless noisy, no doubt some of them were more or less intoxicated, and their language was offensive to the plaintiff. The agent, it appears, endeavored to remedy this, enjoining them to be quiet in the presence of the lady. Mr. Hughes' version of the matter was not given to the jury as the defendant was unable to locate him and secure his attendance. Rosa Bailey, an employee of Mrs. Grant, the boarding house keeper, testified that Mr. Hughes brought plaintiff to her, and that she escorted her to the boarding house. The plaintiff, however, testified that this was not so, that she secured the services of Rosa Bailey herself. While plaintiff's version impeaches the courage and chivalry of Mr. Hughes, it makes no case of wanton injury inflicted on her by defendant. It is not the duty of a common carrier to provide escorts for unattended ladies until they leave the station premises. It is the duty of a common carrier when there is reasonable ground to apprehend injury to a passenger by third persons to use the highest degree of care to prevent it. But, where no injury has been sustained, there is no actionable breach of duty. The complaint alleges merely that the conduct of defendant caused "great mental and nervous shock and anxiety" to plaintiff. There is no allegation of physical or bodily injury. The law in this state does not allow recovery of damages for mental suffering in the absence of bodily injury, except under the mental anguish statute with reference to telegraph companies. *Mack v. Railroad Co.*,

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52 S. C. 323, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913; *Lewis v. Telegraph Co.*, 57 S. C. 330, 35 S. E. 556.

The judgment of the circuit court is reversed, and the case remanded for a new trial.

GULF, W. T. & P. RY. CO. v. WITTNEBERT.

(Supreme Court of Texas, Feb. 26, 1908.)

[108 S. W. Rep. 150.]

Carriers—Transportation of Freight—Defective Loading or Packing.*—Where a consignor loads freight on a car or packs articles for shipment, the carrier receiving the car as loaded or the package as prepared is not liable for damages arising from a defect in the loading or packing.

Same—Inspection of Car.*—It is not the duty of a railroad company which receives a loaded car from the consignor or from another railroad company to make an inspection of the manner of loading, when the defect cannot be discovered by external examination.

Railroads—Injuries to Persons Unloading Car—Defective Loading—Inspection—Negligence.—Plaintiff was injured while attempting to unload an oil tank car because the unloading valve had been left open when the car was delivered by defendant, the ultimate carrier, to plaintiff's employer, the consignee. The condition of the valve was not discoverable by an external examination, but only after opening the cover of the dome on top of the car which could only be done by means of a wrench. Held, that defendant was not negligent in failing to ascertain that the valve was open before delivering the car to the consignee.

Error from Court of Civil Appeals of First Supreme Judicial District.

Action by Dan Wittnebert against the Gulf, West Texas & Pacific Railway Company. A judgment for plaintiff was affirmed

*See extensive note, 11 R. R. R. 419, 34 Am. & Eng. R. Cas., N. S., 419; foot-notes appended to *Broadwood v. Southern Express Co.* (Ala.), 25 R. R. R. 562, 48 Am. & Eng. R. Cas., N. S., 562; *Calender-Vanderhooft Co. v. Chicago, etc., Ry. Co.* (Minn.), 24 R. R. R. 455, 47 Am. & Eng. R. Cas., N. S., 455; extensive note, 9 R. R. R. 6, 32 Am. & Eng. R. Cas., N. S., 6; foot-notes appended to *Boston & M. R. R. v. Sargent* (N. H.), 12 R. R. R. 459, 35 Am. & Eng. R. Cas., N. S., 459; *Frazier v. Charleston & W. C. Ry. Co.* (S. Car.), 19 R. R. R. 768, 42 Am. & Eng. R. Cas., N. S., 768; *Illinois Cent. R. Co. v. Holt* (Ky.), 21 R. R. R. 455, 44 Am. & Eng. R. Cas., N. S., 455; extensive note, 25 R. R. R. 323, 48 Am. & Eng. R. Cas., N. S., 323.

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by the Court of Civil Appeals (104 S. W. 424), and defendant brings error. Reversed and rendered.

Proctors and Vandenberg & Crain, for plaintiff in error.

Lackey & Lewright, for defendant in error.

BROWN, J. For many years prior to June, 1903, H. Runge & Co. were engaged in running a cotton gin at Cuero, Tex., and at the time of the injury to Wittnebert they used Beaumont crude oil for fuel. About June, 1903, Runge & Co. ordered a tank of Beaumont oil from McManus, Houck & Co., of Beaumont, which was loaded into a tank car that belonged to the Texas & New Orleans Railroad Company, and was by the latter company and an intermediate carrier transported to Victoria, and there delivered to the Gulf, West Texas & Pacific Railway Company, by which it was hauled to Cuero, Tex., its destination, and on the 12th day of June, 1903, for the purpose of being unloaded, the car was placed upon a side track opposite to a pipe which connected with the oil reservoir of H. Runge & Co. Wittnebert had charge of the gin of Runge & Co., and, with an assistant, undertook to unload the oil tank. The method of unloading the tank was to connect a piece of hose with the pipe that was connected with the reservoir, then to fasten the hose upon the end of an escape pipe which extended beneath the bottom of the tank, by which the oil would pass through the hose into the pipe leading to the reservoir. It was necessary, before connecting the hose with the pipe, to remove the tap from the end of the escape pipe through which the oil should pass. Wittnebert and his assistant went under the car, and Wittnebert removed the tap, whereupon the oil flowed down from the tank upon him, inflicting the injury for which this suit was brought. In the construction of the tank there was a valve which, when properly set, closed the upper end of the escape pipe, and would prevent the oil from flowing through the escape pipe. A round iron rod connected with the valve and the other end extended into the dome, and the proper method of unloading was, after removing the tap and attaching the hose, to go up on top of the tank and raise the valve by means of a monkey wrench. When this car was placed upon the track, the valve was not set, and when the tap was removed the oil flowed out upon Wittnebert. If the valve had been set as it should have been, this would not have happened. Upon top of the tank was a dome which, when delivered to plaintiff in error, was covered by a cap screwed down upon it. The valve could be raised by a rod which passed up through the tank and into the dome. No one could tell whether the valve was set or not without going upon the car, removing the cap of the dome, and ascertaining the fact from the position of the rod. When the car was delivered to the plaintiff in error at Victoria, it was inspected by the

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inspector of the plaintiff in error at that place, who, however, did not go upon the top of the tank, nor remove the cap to ascertain whether or not the valve was set. The inspector could have ascertained the fact by removing the cap and examining the rod. Wittnebert had unloaded six or seven oil tank cars at the same place before this, all of which had the valves set when they were placed upon the side track at the point for unloading, and he had never opened the valve before removing the cap. Wittnebert knew that if the valve was not set, and the tap should be removed, the oil would flow out upon him, and, if he had known that the valve was not set, he would not have removed the tap. He could have ascertained the condition of the valve by looking into the dome. The injury inflicted upon the defendant in error was sufficient to justify the amount of damages recovered in the trial court.

The only question presented to this court is: Was it the duty of the Gulf, West Texas & Pacific Railway Company to see that the valve was set and the tank in a safe condition to be unloaded when delivered to the consignee? The judgment in this case has no support except upon the failure of the railway company to examine into the manner in which the car was loaded to ascertain whether the safety valve had been set so as to make it safe for any person who might unload the car when delivered to the consignee. It was the duty of the railway company upon receiving the tank car to make a reasonable inspection of its condition with reference to its fitness for transportation; but we have been unable to find any authority which goes to the extent of holding that it was the duty of the railway company, under such facts, to inspect the manner of loading the car so as to ascertain whether the freight was so arranged as to be safe to persons who might be called upon to remove it from the car. The honorable Court of Civil Appeals cites *Sykes v. Railroad Company*, 178 Mo. 693, 77 S. W. 723, and adopts its reasoning as applicable to the facts of this case. In that case a car had been loaded at Kansas City with old car wheels consigned to the St. Louis Car Wheel Company at St. Louis. The car was carried by the Kansas City, Ft. Scott & Memphis Railway Company to its connection with the St. Louis & San Francisco Railroad Company, and the latter received and hauled the car to a local station in the city of St. Louis, where it was delivered to the Missouri & Pacific Railway Company, by which the car was carried to the premises of and delivered to the consignee. Sykes, an employee of the car wheel company, entered the car for the purpose of removing the old car wheels when his foot and leg passed through a hole in the floor, whereby he received his injury. There were a number of holes in the floor of that car with hay and other things thrown over them. Sykes sued the St. Louis & San Francisco Railroad Company, the

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intermediate carrier. The Supreme Court of Missouri held that the intermediate carrier was not liable, but in delivering the opinion said that the Missouri Pacific Railroad Company, which delivered the car to the consignee, would be liable under such circumstances. This was pure dicta. The question was not before the court. The Missouri Pacific Railroad Company was not a party to the suit. However, that case is distinguishable from this case, in this: That the injury in that case occurred through a defect in the car itself, while in this there was no defect in the car, but in the loading of it. The duty of the two carriers depended upon entirely different facts. Therefore, if the reasoning of that court be sound, it is not applicable to the question now presented to this court.

We have found no dissent from the general rule that, when the consignor loads freight upon a car or packs articles for shipment, the carrier which receives the car as loaded, or the package as prepared, is not liable for damages which arise from the defect in the loading or the packing. *Hutchison on Carriers*, § 333; *T. & P. Ry. Co. v. Klepper* (Tex. Civ. App.) 24 S. W. 567; *Mexican Cent. Ry. Co. v. Shean* (Tex. Sup.) 18 S. W. 151; *Ross v. Troy & Boston Ry. Co.*, 49 Vt. 364, 24 Am. Rep. 144; *Milwaukee v. Chicago & N. W. Ry. Co.*, 37 Wis. 190; *Western Ry. Co. v. Harwell*, 97 Ala. 350, 11 South. 781; *Klauber v. American Express Co.*, 21 Wis. 21, 91 Am. Dec. 452; *McCarthy v. L. & Ry. Co.*, 102 Ala. 193, 14 South. 370, 48 Am. St. Rep. 29; *Cohn v. Platt* (Sup.) 95 N. Y. Supp. 535; *Tex. Cent. Ry. Co. v. O'Loughlin* (Tex. Civ. App.) 84 S. W. 1104. In *Railway Co. v. Klepper* the Court of Civil Appeals for the Second District held that, where horses were placed in a car by the owner for shipment over a railroad, the railroad company was not liable for damages which occurred to the horses by their being overcrowded in the car, and this conclusion was placed upon the ground that the railroad company was not responsible for the act of the shipper in improperly loading his own freight, but might haul the car as loaded. In the case of *Mexican Central Ry. Co. v. Shean* the Commission of Appeals, by Judge Garret, rendered an opinion which was approved by the Supreme Court, in which it was held, although expressed in a very few words, that, where a loaded car was by one railroad delivered to another, it did not devolve upon the railroad receiving the loaded car to cause the loading to be inspected, adjusted, or corrected. It is said that the duty to furnish safe appliances and machinery, including cars, does not extend so far. A lot of mules were shipped upon a railroad which delivered the car loaded to the Western Railroad Company, which delivered the stock to the consignee. Upon delivery, it was found that some of them had been injured by spikes or long nails driven on the inside of the car. It was held

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that the last company was not liable for the damages, and the court said: "Such transfers and the inspection to be made during their occurrence must need be made according to some order and system adopted by the railroad company, and by persons appointed for that duty. Attention must be given to all cars coming into their custody, and all other duties reasonably imposed upon the inspector must be performed. There was nothing to indicate to the inspector the existence of the nails or spikes inside the car. In view of these facts, the simple question is: Was it the duty of the inspector to remove the mules and examine the car on the inside for dangerous projections? We are clearly of the opinion that it was not." *Western Ry. Co. v. Harwell*, cited above. That case is strongly in point. The defect in the loading of the tank—that is, the failure to set the valve—could not be seen from the outside, but the dome must have been opened and looked into in order to ascertain that fact. In *Miltimore v. Chicago & N. W. Ry. Co.* the shipper selected, an open car for the shipment of a wagon, and loaded it upon a car without in any way confining it. While the train was in motion, a high wind blew the wagon from the car, and it was damaged. The shipper sought to hold the railroad company liable for the injury to the wagon, but the Supreme Court of Wisconsin held that the shipper, having chosen his car, and having himself loaded the wagon upon the car, could not recover for damages resulting from the defective manner in which the wagon was secured. In the case of *Texas Central Ry. Co. v. O'Loughlin* the Court of Civil Appeals for the Second District held that where the railroad company received beef cattle for shipment to St. Louis, limiting its liability to its own line, and the shipment upon that line terminate at Cisco, where the car was delivered to the Texas & Pacific Railroad Company which delivered it to the Missouri, Kansas & Texas Railroad Company at Ft. Worth, the Texas Central Railroad Company bedded the car, but failed to make the bedding sufficient to protect the cattle from injury. The Texas Central delivered the car at Cisco within a few hours after receiving it, and the cattle were not seriously damaged up to that time, but the shipment was continued in the same car to Muskogee, Ind. T., without removing the cattle from the car or renewing the bedding. The principal damage done to the cattle in the shipment occurred after the car left the Central Railroad, and that company, being sued for damages, defended upon the ground that its liability was limited to its own road, but the court held that, as it had made the bedding and improperly loaded the cattle in a car which was to continue as loaded after it was delivered to the succeeding carrier, its liability continued, and the next carrier which received it did not become liable for the damages arising from the improper bedding furnished by the first carrier, because it transported the cattle as loaded when delivered to it.

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This court refused an application for writ of error in that case. The authorities cited and from which we have made the quotations above establish the proposition that it is not the duty of a railroad company which receives from the owner or from another railroad company a loaded car to make an inspection of the manner of the loading when the defect cannot be discovered by an external examination. If, in this case, the oil had been lost by the failure to set the valve, and Runge & Co. had sued the plaintiff in error for the value of the oil, no recovery could have been had, because no duty of inspection existed. Therefore no negligence would be shown by the facts.

The railroad company in the capacity of common carrier not being liable for property lost under like circumstances, how can it be that a railroad company with regard to the same freight would be under obligation to make an inspection in order to protect persons in the employ of the consignee when unloading the car? The only connection that the railroad company had with the unloading of the car was to place it in a proper position to be unloaded, and, in doing so, it would have been liable for any injury which might have occurred through negligence on its part in performing that duty. But it was in no sense bound to see that the contents of the tank were in proper condition for unloading. In order to make the inspection claimed, the inspector at Victoria would have been required to go upon the top of the oil tank, unscrew the cap from the dome, and test the valve to ascertain whether it was properly set. As we have seen, no such duty of inspection rested upon the railroad company with regard to loaded cars received from another road, either to secure the freight or to protect its own servants while operating the train. We have found no precedent for holding that the railroad company owed such duty to the consignee, nor do we know of any rule of law that would support such a conclusion.

If the man who assisted Wittnebert had received the injury, and had sued Runge & Co., it would present a more serious question whether Wittnebert's failure to inspect and adjust the valve would not be such negligence as would make Runge & Co. liable. There are sounder reasons for holding that Runge & Co. were charged with that duty to their employees than for placing it on the plaintiff in error. We are of the opinion that Wittnebert had no cause of action against the railroad company in this case upon the facts as detailed; and, as his own testimony shows that he could make no better case upon another trial, it is useless to remand the case to the district court.

It is therefore ordered that the judgments of the Court of Civil Appeals and the district court be reversed, and that judgment be here rendered that the defendant in error take nothing by his suit, and pay all costs of all of the courts.

CENTRAL OF GEORGIA RY. CO. *v.* A. F. MERRILL & CO.

(Supreme Court of Alabama, Dec. 19, 1907.)

[45 So. Rep. 628.]

Carriers—Bills of Lading—Limitation of Liability—Construction.*

—A bill of lading provided that "no carrier shall be liable for loss or damage not accruing on its portion of the route, nor after said property is ready for delivery to the consignee." Held that, the stipulation being intended to qualify or limit the common-law liability and therefore to be strictly construed against the carrier and in favor of the shipper, the term "carrier" should be taken as referring, not merely to the transportative capacity of the company, but to the contracting entity in its dual capacity of common carrier and warehouseman.

Same—Validity.*—The stipulation so construed, being one undertaking to contract against liability for loss, however negligently it might be inflicted, was void.

Same—Carriage of Goods—Delivery—Reasonable Time to Accept Goods—Change in Nature of Carrier's Liability.†—After a consignment is ready for delivery to the consignee by a carrier at destination, the custody as a common carrier will not cease by operation of law, and become that of a warehouseman, until the lapse of a reasonable time in which to accept the shipment.

Same—Determination of Reasonable Time for Acceptance by Consignee.—What is a reasonable time for a consignee to accept a ship-

*See foot-notes appended to *Morse v. Canadian Pac. Ry. Co.* (Me.), 9 R. R. R. 296, 32 Am. & Eng. R. Cas., N. S., 296, where all the preceding authorities on the subject are collected; *Adams Express Co. v. Walker* (Ky.), 24 R. R. R. 145, 47 Am. & Eng. R. Cas., N. S., 145; foot-notes appended to *Baltimore & O. R. Co. v. Doyle* (C. C. A.), 24 R. R. R. 129, 47 Am. & Eng. R. Cas., N. S., 129; foot-notes appended to *McConnell v. Southern Ry. Co.* (N. Car.), 23 R. R. R. 580, 46 Am. & Eng. R. Cas., N. S., 580; *Arthur v. Texas & Pac. Ry. Co.* (U. S.), 23 R. R. R. 583, 46 Am. & Eng. R. Cas., N. S., 583; foot-notes appended to *Chesapeake & O. Ry. Co. v. Beasley, Conch & Co.* (Va.), 23 R. R. R. 168, 46 Am. & Eng. R. Cas., N. S., 168; foot-notes appended to *Denver & R. G. R. Co. v. Whan* (Colo.), 23 R. R. R. 70, 46 Am. & Eng. R. Cas., N. S., 70; *St. Louis, etc., R. Co. v. Phillips* (Okl.), 22 R. R. R. 201, 45 Am. & Eng. R. Cas., N. S., 201.

†For the authorities in this series on the question, when does the carrier's liability on account of freight terminate after its arrival at destination, see foot-notes appended to *Stapleton v. Grand Trunk Ry. Co.* (Mich.), 9 R. R. R. 332, 32 Am. & Eng. R. Cas., N. S., 332, where all the preceding ones are collected; foot-notes appended to *Central of Georgia Ry. Co. v. Jones* (Ala.), 25 R. R. R. 109, 48 Am. & Eng. R. Cas., N. S., 109; *Kicht v. Wrightsville & T. R. Co.* (Ga.), 23 R. R. R. 605, 46 Am. & Eng. R. Cas., N. S., 605; *Brunson & Boatwright v. Atlantic Coast Line R. Co.* (S. Car.), 23 R. R. R. 19, 46 Am. & Eng. R. Cas., N. S., 19.

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ment, where not regulated by statute depends upon the circumstances of each case, such as the proximity of the consignee to the point of delivery and his knowledge of the arrival of the shipment.

Same.—A shipment was ready for delivery by a railroad company to the consignee at about noon March 27th, and was burned that night after 10 o'clock. It did not appear where the consignee resided or was engaged in business, or that he knew of its arrival or readiness for delivery. Held that, the daylight within that period being only seven hours, it was not a reasonable time within which the company's liability should be changed from that of a carrier to that of a warehouseman.

Appeal from Circuit Court, Covington County; H. A. Pearce, Judge.

Action by A. F. Merrill & Co. against the Central of Georgia Railway Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Charles P. Jones and W. F. Thetford, Jr., for appellant.
C. E. Reid, for appellees.

MCCLELLAN, J. The plaintiffs (appellees) instituted this action for the loss of certain goods freighted by them to a station on appellant's line of railroad. The shipment arrived at its destination and was ready for delivery about noon of March 27, 1905, and on that night was burned in appellant's depot, which was then consumed without the fault or negligence of the appellant, its servants or agents.

The point taken and stressed is that the relation of carrier had terminated, and that of warehouseman existed, at the time of the destruction of the property. Plea 2 sets up as the basis for this contention the following stipulation in the bill of lading: "No carrier shall be liable for loss or damage not accruing on its portion of the route, nor after said property is ready for delivery to the consignee." Being a stipulation intended to qualify or limit the common-law liability, it must be strictly construed against the carrier and in favor of the shipper. 6 Cyc. pp. 409, 410, and notes; A. G. S. R. R. v. Thomas, 89 Ala. 294, 7 South. 762, 18 Am. St. Rep. 119. In this light we cannot take the term "carrier" as referring only to the transportative capacity of the company undertaking the duty in the premises. It refers to the contracting entity, rather than to one of the capacities in which it serves the public. In other words, the limitations borne by the clause are not confined in effect to the common carrier as such; and this is evident when it is noted that the phraseology of the stipulation takes no account of the universally recognized dual relation of common carrier and warehouseman, succeeding each other by operation of law and capable of obtaining with refer-

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ence to property intrusted for shipment to its care. If we are correct in this interpretation of the term, the stipulation should be read "company," instead of "carrier;" and, in that event, the provision is one undertaking to contract against liability, however negligently the loss may be inflicted. Such limitations on liability, under the influence of repeated adjudications here, must be declared void. 2 Mayfield's Dig. p. 648, citing authorities; 6 Cyc. p. 387 et seq., and notes.

The plea asserts the position of appellant to be that the latter sentence in the clause was to effect a change of liability from that of a common carrier to that of a warehouseman. In support of this insistence *Western Ry. v. Little*, 86 Ala. 159, 5 South. 563, is cited. The stipulation of the bill construed in that case was as follows: "That the company will not hold themselves liable for damages (either from fire or other cause) as common carriers, for any article after it has been transported to its place of destination, and been placed in the depot of the company." It is plain that the purpose of the provision was to determine, upon the event, the more exacting liability of common carrier, and to allow the more immediate attaching of the less exacting liability of a warehouseman. The difference between the stipulation there and here is papable. We do not think there can be drawn from this clause any purpose to end the higher liability and submit the rights of the parties to the lesser. It is true the stages from acceptance for transportation to delivery are mentioned, in a way, in the respective sentences composing the clause; but from this there can be found no warrant for a conclusion that the intent of the provision was to exempt, upon the condition, the company from the severed liability. The case of *Tallassee Mfg. Co. v. Western Ry.*, 128 Ala. 167, 29 South. 203, is also distinguishable from this, in that the clause there passed upon expressly undertook the shifting of the liability from that of a common carrier to that of a warehouseman. Notwithstanding the general duty to construe contracts, or their provisions, with the view to sustain rather than defeat them, the clause at hand does not appear to afford any opportunity to give it an interpretation other than that stated. It is either valid or void, depending solely upon the consideration whether a flat stipulation against every liability, however invited, can be sanctioned. If the question was whether the parties could legally terminate, by appropriate expression, the stringent responsibility of a common carrier, short of the time the law maintains it, and erect that of a warehouseman, the *Little Case*, *supra*, would be apt for citation. It results that the demurrer to plea 2 was properly sustained.

The appellant insists that the affirmative charge erroneously took from the jury the injury whether a reasonable time had elapsed, after arrival of the goods and before their destruction,

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for the acceptance of the shipment by the consignee. The rule is that, after the consignment is ready for delivery at destination to the consignee, the custody as a common carrier will not cease by operation of law, and become that of a warehouseman, until the lapse of a reasonable time in which to accept the shipment. *Tallassee Co. v. Western Ry.*, supra; *L. & N. R. Co. v. Oden*, 80 Ala. 38. What is a reasonable time must necessarily vary with the circumstances attending each case, where the statute does not apply. Leading among influential conditions determining the reasonableness of the period are the proximity of the consignee to the point of delivery and knowledge of the consignee of the arrival of the shipment thereof. The bearing of these facts on the issue, while not, of course, conclusive in any sense, are measurably persuasive in the premises; for it is obviously more reasonable for one who knows of the arrival of the consignment, or for one whose residence or business is near by the carrier's station, to accept his property, than for one not so informed or so conveniently situated. The record shows, without conflict, that the property was ready for delivery about noon on March 27th, and was burned that night after 10 o'clock. There is an absence of evidence that the consignee knew of its arrival or readiness for delivery, or where he resided or was engaged in business. Under these circumstances we cannot affirm that the trial court incorrectly concluded that the period between the time when the articles were ready for delivery and their destruction was reasonable under the rule. We know that the daylight, within the period, was at that season seven hours at most, and that space is certainly, under the conditions here appearing, not a reasonable time within which appellant's duty and liability should have been materially changed from one of insurance, aside from the limited exceptions the law invokes, to one of responsibility for negligence only.

There is no error in the record, and the judgment is affirmed.
Affirmed.

TYSON, C. J. and HARALSON and DENSON, JJ., concur; TYSON, C. J., limiting his concurrence to the conclusion reached.

CLARK v. GRAND TRUNK WESTERN RY. CO.

(Supreme Court of Michigan, Sept. 20, 1907.)

[112 N. W. Rep. 1121.]

Railroads—Operation—Fires—Evidence—Sufficiency.*—In an action against a railroad company for loss by fire alleged to have been set by sparks from its engine, it is not sufficient to show only that the fire might have been so set.

Same—Question for Jury.—In an action against a railroad company for loss by fire alleged to have been set by sparks from its engine, whether the fire was set as alleged held for the jury.

Same.—In an action against a railroad company for loss by fire alleged to have been set by sparks from its engine, whether the engine was in good order and properly managed held for the jury.

Error, Writ of—Review—Harmless Error.—Where counts of a declaration present different grounds of recovery, and one of such grounds, under the evidence, should be withdrawn from the jury, but is not, and it is not possible to determine on which ground a verdict against defendant is rendered, a new trial must be granted.

Railroads—Operation—Cutting of Fire Hose.—Where, there being no other efficient way to carry water to extinguish a fire, the hose is laid across the tracks of a railroad, and employees in charge of a train know of its presence, and there is no occasion for haste, and they can stop the train, but, instead thereof, they run over the hose, thereby causing such delay in procuring water that the property is destroyed, the railroad company is liable for the loss.

Same.—A railroad cannot be charged with negligence in not looking for and discovering hose laid across its tracks for the purpose of carrying water to extinguish a fire.

Error to Circuit Court, Eaton County; Clement Smith, Judge.

Action by Sarah P. Clark against the Grand Trunk Western Railway Company. Judgment for plaintiff, and defendant brings error. Reversed, and a new trial granted.

In three counts of plaintiff's declaration, it is charged that fire from one of defendant's locomotive engines was negligently cast upon and set fire to the premises of plaintiff. In a fourth count the charge is that, the same premises being found to be on fire, the fire company of the city had attached a hose to a nearby hydrant, laid the hose across defendant's tracks in a street there crossing said tracks, and was about to and could easily have extinguished the fire, but for the act of servants of defendant in negligently

*See foot-notes appended to Gracy v. Atlantic Coast Line R. Co. (Fla.), 26 R. R. R. 508, 49 Am. & Eng. R. Cas., N. S., 508.

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running another locomotive engine and cars over and upon the hose, cutting and destroying it, delaying the firemen until the conflagration had reached a stage where it could not be controlled. The plea was the general issue. The case went to the jury upon both charges, and a general verdict for plaintiff was returned, upon which judgment was entered. The substance of all the evidence given upon the trial is returned, and the errors assigned and relied upon by counsel for defendant present three principal questions: (1) Whether there is any evidence that defendant set fire; (2) whether the evidence that the engine was in proper condition and properly managed (2 Comp. Laws, § 6295) required the trial court to withdraw the question of its condition and management, and the one of defendant's liability for setting the fire, from the jury; (3) whether there is any evidence of negligence in cutting the fire hose, and, if there is, whether there is resulting liability to pay for the damage done by the fire.

Argued before GRANT, BLAIR, MONTGOMERY, OSTRANDER, and HOOKER, JJ.

Harrison Geer, for appellant.

Frank A. Dean and Barger & Hicks, for appellee.

OSTRADER, J. (after stating the facts as above). 1. The fact that the fire was set, as alleged, must be proved; not, necessarily, by the testimony of an eyewitness, but by evidence which reasonably leads an inquiring and unbiased mind to the conclusion that a cinder from the particular engine caused the fire. The evidence is not sufficient if it establishes no more than that the fire might so have been set. "The origin of a fire, under such circumstances, must be established so as to produce conviction, to a reasonable certainty, on an unprejudiced mind, the same as any other fact; and, until there is evidence to so establish it, the defendant is not called upon to prove that the fire was not caused as alleged." *Finkelston v. Railway Co.*, 94 Wis. 270, 68 N. W. 1005.

The evidence presented to support the inference that the fire was set as alleged is, in substance, here stated, and, where there are variations, in form most favorable to plaintiff. The defendant's tracks run, at the place in question in the city of Charlotte, from the northeast to the southwest, and plaintiff's premises are south and east of the tracks. On the morning of November 9, 1903, an alarm of fire was turned in at about 1:48 o'clock, by whom is not shown, and a fire was discovered by those who responded to the alarm in the southwest corner of a shed 70 feet long and from 15 to 20 feet high from ground to peak of roof, running substantially parallel with defendant's tracks, and connected with a larger and main building by a covered passage and a door. There were grass and papers and other debris along the right of way and near the shed, which was about 35 feet from the

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track on which the train, hereinafter referred to, was running. It is not claimed, however, that the fire was set otherwise than by a cinder or spark carried in the air to or upon the shed. The wind was blowing quite strongly from the southwest; that is to say, up the right of way in a direction opposite to the one the train was moving. It was very dry. The shed was built of wood, was old and dry. The shingles were warped. "I could not tell whether the fire was on the side of the building next to the railroad, or whether it was on the top of the building." "The blaze was coming from the southeast [probably meaning southwest] corner of my rim shed." "It was apparently all on the outside of the building, or near the roof, or on the roof." "It was in the southwest corner of the shed." "I first discovered the fire in the southwest corner of the rim shed." "It seemed to be in the southwest portion of it." "In the southwest corner of the rim shed. A small blaze was on the outside of the building and seemed to be eating towards the roof." "It was in the corner of those sheds." "I couldn't say where the fire was in reference to this building except that I knew it was in the end of the rim shed somewhere." "Was on the south and west side of those sheds." "There was some fire on top. I didn't think there was any on the inside. I didn't go in." "In the southwest corner of the sheds." "It was on the outer portion of the works next to the track and in the roof." "The fire had started in the rear of the building at the southwest corner." "The fire was in the southwest corner of the rim shed, apparently on the outside of the building, running up into the roof."

These are statements of various witnesses for plaintiff, including the owner, her employee, and the firemen, about the position of the fire when first seen by them. About 15 or 20 minutes before the alarm of fire was given, a passenger train went west on defendant's road. None of plaintiff's witnesses saw it. There is testimony to the effect that the engine was puffing very hard and seemed to be going fast—this from witnesses who were, at the time, indoors. No one on the train saw any fire in plaintiff's shed. No evidence was introduced on the part of the plaintiff to prove the condition, equipment, or management of the locomotive. Plaintiff's premises, the rear of which abuts upon the railroad right of way, are near the intersection of Sheldon street and Foote street, about 800 feet to the west or southwest of the railroad station. There are a number of buildings used for residences and for other purposes in the immediate vicinity. No testimony was introduced tending to prove that the fire was set in any way other than as claimed by plaintiff. Counsel for plaintiff argue that the testimony introduced by defendant upon the subject of the integrity and management of the locomotive on the night in question furnished, some of it, support for infer-

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ence that the fire originated in the manner alleged in the declaration. We need not set it out, because we have already made it appear that we should not say there is no testimony upon the subject to go to the jury under proper instructions. The locomotive carried fire. The testimony is that an engine in first-class condition and properly managed will emit sparks. The conditions described were favorable to the setting of such a fire as was discovered. There was proximity of time and of place.

2. The testimony for defendant, to the effect that the locomotive was properly equipped and managed, is not contradicted, and is conclusive, unless, as counsel for plaintiff insist, it is to be measured against an alleged presumption of improper equipment or of improper management arising upon the fact that the locomotive set the fire. This court has recently construed and applied the statute (2 Comp. Laws, § 6295) adversely to the contention of the plaintiff here. *Dolph v. Railway Co.*, 112 N. W. 981. If upon the whole case there is room for inference, based upon evidence that equipment was defective, or that management was improper, the case is for the jury. Whether in any case the fact of setting a fire would be any evidence of infirmity of apparatus or of improper management must depend upon other facts and circumstances in evidence. In the case at bar, no peculiar conditions calling for any unusual care in managing the locomotive were present. Counsel say a conflict of evidence is made by, or room for inference of defective equipment or improper management found in: (1) The testimony of the fireman that he put in coal while passing through Charlotte, the open door of the fire box tending to increase the draft; (2) the evidence that the engine had not before or after the occasion set fires; (3) because the engineer did not inform the jury about "where were the levers," how wide open was the throttle, how he was handling the engine, what he was doing to it, were the drivers slipping opposite the premises in question, how heavy was the train, how much steam was used; (4) the testimony of defendant's experts that an engine in good repair could not throw sparks a distance of 30 feet and set a fire; (5) the testimony of two of plaintiff's witnesses who heard the train and thought it was going fast, though the engineer said it was running no faster than 12 miles an hour; (6) the evidence that the slipping of the drivers and the weight and speed of the train would be facts indicating whether sparks were given off in greater or smaller quantity. Some of these claims are altogether unsupported by the record, as will be pointed out. Briefly summarized, the testimony on this point is as follows: The train in question reached Charlotte at 1:27 a. m., leaving at 1:30. Its engine, numbered 988, was assigned to the defendant by the Grand Trunk Railway Company of Canada in May, 1903, and had been thereafter used to draw

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passenger trains between Port Huron and Chicago. The engine had a spark arrester, made of No. 10 wire, with meshes $2\frac{1}{2}$ by $2\frac{1}{2}$ to the square inch, which is as small as experience shows can be used and have an engine steam properly. Each engine was washed out after being run \$1,000 miles, and a thorough examination made of the fire boxes, netting, smokestack, etc. There is also a monthly inspection of all engines, and the fire boxes and the dampers are examined before every trip. Engine No. 988, according to a record kept by defendant, had her first washout May 17, 1903, and was then in first-class condition as to nettings, diaphragm plates, baffle plates, fire box, and smokestack. A record produced at the trial showed an inspection on November 6, 1903, which disclosed smokestack, netting, plates, ash pans, and dampers in good condition. A further inspection was made November 16, 1903, at which time it was in good condition. The engineer in charge on the morning of November 9, 1903, testified that on that trip, which began at 9:00 p. m. on November 8th at Port Huron, the engine was in good condition, that it was running no faster than 12 miles an hour as it passed plaintiff's premises, and that he was handling it in a careful manner. His next trip on the engine was November 14th, and at that time it was in good condition. Meantime, and on the night of November 9th, another engineer took the engine out and found it in first-class condition. The fireman testified that on the morning in question, on leaving the station at Charlotte, and following his usual custom in leaving a station, he put in from five to seven shovels of coal, which would have a tendency to smother the fire, cause more smoke to escape, but no sparks. There is no testimony that an engine in good repair, equipped as this engine was, will not throw sparks 30 or 35 feet and set a fire. The testimony, that of the master mechanic, is: "Q. Do you think an engine on your road in good repair properly handled would emit sparks through this device with sufficient life to set fire? A. I hardly think so. Q. Your opinion is, as a master mechanic, an engine on your road equipped with this device in good shape would not throw sparks of sufficient vitality to cause a fire? A. It is possible that they would in some instances. Q. What would you say now as to whether an engine upon your road, equipped with the spark arresting device which you have described, in good repair, and properly handled, would throw live sparks and cinders a distance of 30 or 40 feet, and the cinders retain enough vitality or life to set a building on fire, if dry? (Objected to as being guesswork. Objection overruled. Exception for defendant.) A. If it would do this, I wouldn't think there would have to be anything the matter with the engine. However, if there was a hole in the screen, it would have more of tendency to emit sparks than otherwise." The undisputed testi-

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mony is, too, that this locomotive had, so far as was known, never before and never since set a fire. The other contentions noted are disposed of by what has been already said, except perhaps the one that the engineer did not, in detail, state how he was managing the engine. He had 15 years' experience as engineer; the testimony showing him to be a first-class man. While proper management, to excuse liability, is a fact to be shown affirmatively, the omission to relate some small detail of management will not be regarded, when counsel for plaintiff do not call for it, and when neither the court nor jury can know or assume that the missing detail is material. He did state the speed at which he was running, said that he was not in haste, having plenty of time, that his engine was all right, and that he was running her in a careful manner, but had no particular recollection what he did on that night different from any other night. Defendant's evidence is conclusive that machinery, smokestack, and fire boxes were in good order and properly managed, unless it can be said that the mere fact that a fire was set by the engine in plaintiff's building 35 feet from the track is conflicting evidence.

3. A wagon carrying 800 feet of hose was used by the fire department and driven north on Sheldon street to Foote street, which makes, with Sheldon, a right angle. On the corner is a hydrant. One of the firemen alighted and connected the hose to the hydrant; the wagon meantime turning west into Foote street, laying the hose behind it, and crossing the tracks of defendant's road, which were laid diagonally across the street. It seems to have been the plan to approach the fire from Foote street and the right of way of defendant. Defendant has more than one track at this point, and the hose wagon passed some 15 or 20 feet beyond them before stopping. A freight train was at the moment slowly approaching this crossing from the west, and it ran upon and cut the hose before water had been turned on, and before the hose could be disconnected and removed. This cutting of the hose is said to have been an act of negligence, resulting in such loss of time that it may be considered the proximate cause of plaintiff's loss. As we have concluded that the case was improperly submitted to the jury upon the first ground of recovery declared upon, and as it is not possible to tell upon which of the grounds declared upon the jury gave its verdict, the judgment must be in any event, reversed, and a new trial granted. *Leitch v. Railway Co.*, 93 Wis. 79, 67 N. W. 21; *Patton v. Wells*, 121 Fed. 337, 57 C. C. A. 551. It is proper to say, however, and we are of the opinion, that upon a new trial, if the evidence shall satisfy the jury that there was no other efficient way to procure water to extinguish the fire, the hose was rightfully laid across the tracks. If defendant's servants, in charge of the freight train, had notice and warning of the presence of the hose

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on the tracks (they deny having any notice), and had no occasion for haste, and might have stopped the train, instead of doing which they carelessly ran upon and cut the hose, and the cutting of the hose occasioned such delay in procuring water that the destruction of plaintiff's property was the direct and necessary result of such carelessness, plaintiff may recover upon the second ground set up in the declaration such damages as were consequent upon such delay. *Metallic Compression Casting Co. v. Railroad Co.*, 109 Mass. 277, 12 Am. Rep. 689; *Little Rock Traction & Electric Co. v. McCaskill*, 75 Ark. 133, 86 S. W. 997, 70 L. R. A. 680, 112 Am. St. Rep. 48. Defendant's servants cannot, however, be charged with negligence in not looking for and discovering the hose. Whatever the true rule may be in this regard in cases of traction companies operating a railway in the streets of a city, it would be a hard rule which required those in charge of trains on steam roads to watch for and discover, especially in the night, such obstructions upon the track. In the cases cited, as in *Mott v. Railroad Co.*, 1 Rob. (N. Y.) 585, in which a different rule is laid down, the hose was, when cut, filled with water, and the plaintiff, in each case, immediately deprived of a means of putting out the fire. In the present case, the hose was attached to the hydrant, and a man stood ready to turn on the water when he should receive the signal so to do. So far as the question of proximate cause is concerned, the same rule should be applied in both cases. The court was in error in giving the jury the following instruction: "To entitled the plaintiff to recover on this branch of the case you should be satisfied by a preponderance of the evidence that Mr. Martin, the engineer in charge of the freight train, knew, or ought to have known, that the hose was across the defendant's track, and that such knowledge was brought, or should have been brought, to his attention by reasonable diligence on his part in time for him to have stopped his train before reaching the hose across the defendant's track."

Objections were made to the argument of counsel for plaintiff to the jury, and they are pressed in this court. It is not likely the same situation will be again presented, and we need make no comment.

The judgment is reversed, and a new trial granted.

GRANT, J., concurred with OSTRANDER, J.

BLAIR, J. We concur as to the third point. As to the second point we think there was a question of fact for the jury.

MONTGOMERY and HOOKER, JJ., concurred with BLAIR, J.

BISCHOF v. ILLINOIS SOUTHERN RY. CO.

(Supreme Court of Illinois, Feb. 20, 1908.)

[83 N. E. Rep. 948.]

Railroads—Fences—Duty to Maintain.*—Act July 1, 1874 (Rev. St. 1874, c. 114, § 37) § 1, requiring a railroad company to fence its track so as to prevent cattle, horses, etc., or other stock from passing onto the track, and making the company liable where the fences are not kept in good repair for damages to such stock, etc., imposes on companies the absolute duty of maintaining fences to keep stock off the tracks, and, where that duty is not fulfilled, passengers and employees may recover damages occasioned by stock being on the track, and a company may not at its option elect to fence its right of way or elect to assume liability for killing stock on its choosing not to build a fence.

Same.—Act July 1, 1874 (Rev. St. 1874, c. 114, § 37) does not require the company to maintain a fence sufficient to prevent persons from trespassing on the track, though such persons may be of tender years.

Appeal from Appellate Court, Fourth District, on Appeal from Circuit Court, Randolph County; B. R. Burroughs, Judge.

Action by Charles Bischof, administrator of Herman Otto Bischof, deceased, against the Illinois Southern Railway Company. From a judgment of the Appellate Court affirming a judgment for defendant, rendered on sustaining a demurrer to the declaration, plaintiff appeals. Affirmed.

A. E. Crisler, for appellant.

R. J. Goddard and *W. M. Shuwerk* (*R. C. Ritsher* and *W. T. Abbott*, of counsel), for appellee.

CARTRIGHT, J. Appellant brought this action on the case in the circuit court of Randolph county as administrator of the estate of his son, Herman Otto Bischof, a child six years old, who

*For the authorities in this series on the question whether statutes requiring railroad companies to fence their tracks are for the protection of people as well as stock, see extensive note appended to *Goodrich v. Kansas City, etc., Co.* (Mo.), 19 Am. & Eng. R. Cas., N. S., 137 (liability for injury to railroad employee as affected by violation of statute requiring railroad track to be fenced); note appended to *Nickolson v. Northern Pac. Ry. Co.* (Minn.), 18 Am. & Eng. R. Cas., N. S., 682 (children injured); *Lake Shore, etc., Ry. Co. v. Lüdtké* (Ohio), 10 R. R. R. 682, 33 Am. & Eng. R. Cas., N. S., 682 (Ohio statute does not require tracks to be fenced against persons); second foot-note appended to *Paquin v. Wisconsin Cent. Ry. Co.* (Minn.), 21 R. R. R. 639, 44 Am. & Eng. R. Cas., N. S., 639 (injuries to children).

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went upon the track of appellee, not at a public crossing, and was killed, alleging as ground of liability for the damages occasioned by the death of the child a failure to comply with the statute which requires railroad corporations to fence their tracks. The circuit court sustained a demurrer to the declaration, and entered judgment in favor of appellee. The Appellate Court for the Fourth District affirmed the judgment.

The facts alleged in the declaration and admitted by the demurrer are that on the northeast side of the defendant's railroad, between stations Ft. Gage and Menard, and parallel with the railroad, there was a public highway; that it was the duty of the defendant, under the statute, to erect and maintain fences on each side of its railroad; that the defendant did not erect and maintain a fence on either side of its railroad; that the deceased was of the age of six years and two months, and too young to exercise due care and caution for his own safety; that he was sent by his mother, in company with his brother, aged eight years, on an errand along said highway; that, because of the want of a fence, he wandered upon the railroad track, and was struck by a locomotive and killed; that his parents were exercising ordinary care for his safety; and that he left surviving him his father (the plaintiff) and his mother and brother.

The only question presented by the record or argued by counsel is whether section 1 of an act in relation to fencing and operating railroads, in force July 1, 1874 (Rev. St. 1874, c. 114, § 37), imposes upon railroad corporations the duty of erecting and maintaining fences which will prevent children of such tender years that negligence is not imputable to them from going upon the track. It is insisted by counsel for appellant that a railroad corporation is liable, by virtue of that statute, for an injury to a child of such tender years as to be incapable of exercising care for its own safety who goes upon the track by reason of their being no fence. The requirement of the statute is that the railroad corporation shall erect and maintain fences on both sides of its road suitable and sufficient to prevent cattle, horses, sheep, hogs or other stock from getting on its railroad, and it makes the corporation liable, when such fences are not made or kept in good repair, for all damages which may be done by the agents, engines, or cars of such corporation to such cattle, horses, hogs, or other stock thereon and reasonable attorney's fees in any court wherein suit is brought for such damages or to which the same may be appealed. Counsel for appellee contend that the statute merely gives to a railroad corporation an option to fence its right of way, or not as it may choose, and to assume liability for killing stock if it chooses not to build the fence. Their position is that the statute means no more nor less than the corporation may, at its election, construct fences, or, in the event of failing to do so,

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become liable for damages to stock. We cannot assent to that proposition, and held the contrary in *Terre Haute & Indianapolis Railway Co. v. Williams*, 172 Ill. 379, 50 N. E. 116, 64 Am. St. Rep. 44. In that case the railroad company was held liable for the death of its engineer on account of the absence of a fence, which permitted cattle to stray on the track and to cause the engine to be thrown therefrom. It was there said that, while the statute was primarily intended for the benefit of owners of stock, it was also intended for the benefit of passengers and employees who were entitled to be protected from obstructions likely to be upon the track where it is not properly fenced.

The duty to erect a fence suitable and sufficient to keep stock off from the railroad track is absolute; and, if that duty is not fulfilled, the passengers and employees may recover damages occasioned by stock being on the track. The statute, however, does not require a railroad corporation to erect or maintain a fence suitable or sufficient to prevent persons of any age or degree of intelligence from going upon the track. The statutes of the different states vary somewhat; but no court has ever considered that any of them required a corporation to fence against persons who were capable of caring for their safety or had sufficient age and discretion to understand the dangers attending upon going on a railroad track. So far as railroad corporations have ever been held liable, it has been in the case of children of tender years incapable of caring for their own safety. The natural disposition of courts in such cases would be to broaden the statute as much as possible, in view of the fact that the law is more solicitous for the protection of human life than property, and, if the language employed by the Legislature would permit, it would be assumed that it was not the intention to give protection against injury to animals and deny it to infant children. In Wisconsin the statute makes the railroad corporation liable for damages done to persons, as well as animals, until the fences are duly made; and as the Legislature, in requiring fences to be built, had in view the protection of persons as well as property, the corporations have been held liable in cases like this one. *Schmidt v. Milwaukee & St. Paul Railroad Co.*, 23 Wis. 186, 99 Am. Dec. 158; *Stuettgen v. Wisconsin Central Railway Co.*, 80 Wis. 498, 50 N. W. 407. In Michigan the statute provides that every railroad company shall erect and maintain, in effective condition of repair, fences on each side of the right of way, 4½ feet high and of the specified character, and a railroad company was held liable for injury to a child arising from failure to build that kind of a fence. *Keyser v. Chicago, etc., Railway Co.*, 66 Mich. 390, 33 N. W. 867. There have been similar decisions in Nebraska, Missouri, and Minnesota. *Chicago, Burlington & Quincy Railroad Co. v. Grablin*, 38 Neb. 90, 56 N. W. 796, 57 N. W. 522; *Isabel v.*

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Hannibal & St. Joe Railroad Co., 60 Mo. 475; Nickolson v. Railway Co., 80 Minn. 508, 83 N. W. 454. The contrary doctrine is held in Indiana (Baltimore & Southwestern Railroad Co. v. Bradford, 20 Ind. App. 348, 49 N. E. 388, 67 Am. St. Rep. 252), where a child two years old wandered upon the railroad track where the company had suffered the fence to become out of repair and torn down to the ground, so as to offer no obstruction to the child. The opinion of the court was that the liability of the company, under the statute, for failing to fence, was to be determined by the act itself, and that no fence which would be sufficient to turn cattle, horses, sheep, and hogs would offer much of an obstacle to a person, although quite young. It was considered that the statute did not require the company to erect a fence which would keep children off the track. The Supreme Court of Ohio, in the case of Lake Shore & Michigan Southern Railway Co. v. Liidtke, 69 Ohio St. 384, 69 N. E. 653, held that the Ohio statute requiring railroad companies to fence against stock did not require them to fence against persons, and that the company was not liable for an injury to a boy six years old who strayed upon the track through a defective and insufficient fence. The court took the same view adopted by this court in the Williams Case, supra, that the fence might be defective, and by reason thereof stock get upon the railroad and cause damage to person or property, or both, and for such damages the railroad company would be liable, but held that the fences required by the statute were not for the purpose of keeping persons off the railroad. In 3 Elliott on Railroads (section 1190) it is said that where a child not sui juris goes upon a railroad track because it is not properly fenced, and is injured, the company has been held liable upon the ground that it is as much the duty of the company to fence against children as against animals; but that this doctrine should be very carefully limited and applied. The reason there suggested for requiring fences against animals is that they are not possessed of intelligence sufficient to enable them to avoid injury, which proposition seems to us somewhat doubtful, since the protection is extended to the owner, but it is there said that on a somewhat similar reason is based the duty of a railroad company to fence its track against children.

It seems to us that the question must be determined by what the Legislature have said, and, while the common law is more solicitous for the protection of human life than property, the extent of the solicitude of the Legislature must be determined by the language of the statute. No question of a common-law duty is involved in this case, and, if there is a liability on the part of a railroad company in maintaining its premises in such condition that children are likely to stray upon the track and suffer injury, that question is not involved in this case. The Legislature

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fixes the standard of duty and declares the liability, and that standard is the erection and maintenance of a fence suitable and sufficient to prevent cattle, horses, sheep, hogs, or other stock from getting on the railroad. Manifestly that requirement furnishes no standard for a fence which will keep children off. Judge Thompson, in his work on Negligence (volume 2, § 1807), substantially expresses that view by saying: "A statute in terms requiring railway companies to protect their tracks with fences suitable to prevent 'cattle * * * and other stock' from getting thereon, and making them liable for all damages done to such cattle or other stock in cases of a failure so to fence, does not, of course, extend to the protection of children straying upon a railway track." The purpose of the statute is to fix a conclusive liability upon a railroad corporation for a failure to erect a fence sufficient to keep stock off the track and to authorize a recovery for damages resulting from such failure, together with attorney's fees; but we are unable to discover any valid ground upon which it can be said that a requirement to build a fence suitable and sufficient to turn stock imposes the duty to build a fence suitable and sufficient to prevent persons from trespassing on the track, although such persons may be of tender years. There is neither anything in the statute relating to persons or to classes of persons nor anything from which we can gather an intention of the Legislature that the fence should be sufficient to keep children off the track. It may well be that the Legislature made no provision that railroad corporations should fence against persons for the reason stated by the Supreme Court of Ohio in the *Liidtk*e Case, *supra*, that it would be substantially impossible for a railroad company to construct a fence which would be an effectual barrier even to young boys.

We conclude that the circuit court was right in sustaining the demurrer, and the Appellate Court right in affirming the judgment.

The judgment of the Appellate Court is affirmed.
Judgment affirmed.

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Clause of bill of lading did not preclude shipper from showing that actual value of the mules injured exceeded sum specified therein. *Winslow Bros. & Co. v. Atlantic C. L. R. Co. (S. Car.)*, 116.
 Contract exempting carrier of sheep from liability except for willful or gross negligence, and then only on presentation of a claim, is void. *Houtz v. Union Pac. R. Co. (Utah)*, 663.
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 Stipulations of shipping contract which are void as contravening public policy. *Houtz v. Union Pac. R. Co. (Utah)*, 663.
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CARRIERS OF PASSENGERS.

See **INDEPENDENT CONTRACTORS; LEASES AND RUNNING POWERS; MASTER AND SERVANT; STATIONS AND DEPOTS; TICKETS AND FARES.**

Actionable negligence did not appear; it not being shown that the elevated railway guard saw or should have seen the position of the passenger's finger before he closed the car door upon it, or that he should have reasonably anticipated it, or that the hasty entrance of passengers urged by the guard would result in any injury to plaintiff. *Hines v. Boston Elev. Ry. Co. (Mass.)*, 760.

Assaults.

Carrier is an absolute guarantor of the safety of its passengers against the assaults of its employees while it is performing its contract of carriage. *Zeccardi v. Yonkers R. Co. (N. Y.)*, 771.
 Carrier's liability for injuries to passenger from conduct of third persons on station premises. *Taylor v. Atlantic Coast Line R. Co. (S. Car.)*, 774.
 Carrier was not liable for its motorman's assault on and the false charge against its passenger; his injuries having been occasioned during his voluntary intervention in a quarrel as to which defendant owed him no duty. *Zeccardi v. Yonkers R. Co. (N. Y.)*, 771.
 Sufficiency of evidence, in action by passenger, to support verdict for plaintiff. *Taylor v. Atlantic Coast Line R. Co. (S. Car.)*, 774.

CARRIERS OF PASSENGERS—Continued.**Burden of Proof.**

Was on ejected passenger to show that conductor of first car was bound to issue a transfer to the car from which he was ejected. *Birmingham Ry., etc., Co. v. Turner (Ala.)*, 624.

Collisions.

Duty of trainmen to watch for passing trains on intersecting track notwithstanding the presence of an interlocking device, and, if they see danger, to use every precaution to protect their passengers. *Van Orman v. Lake Shore & M. S. Ry. Co. (Mich.)*, 747.

Instruction that would have required the jury to acquit defendant of negligence in causing collision between street car and wagon, even though the quick efforts of the motorman to stop the car were made carelessly and negligently, was properly refused. *Daggett v. North Jersey St. Ry. Co. (N. J.)*, 715.

Question for jury, notwithstanding the use of interlocking device, whether each of two intersecting railroads was negligent in causing a collision in which a passenger was injured. *Van Orman v. Lake Shore, etc., Ry. Co. (Mich.)*, 747.

Sufficiency of evidence to sustain verdict against two intersecting railroads for injuries to a passenger in a collision. *Van Orman v. Lake Shore, etc., Ry. Co. (Mich.)*, 747.

Contributory Negligence.

Alighting from very slowly moving street car. *Birmingham Ry., etc., Co. v. Landrum (Ala.)*, 593.

Attempting to cross track to board train, without stopping, looking, or listening. *Gregg v. Northern Pac. Ry. Co. (Wash.)*, 519.

Duty of passenger to examine his transfer slip. *Morrill v. Minneapolis St. Ry. Co. (Minn.)*, 629.

Duty of passenger, whose access to depot had been obstructed by standing train, to seek shelter from the cold, but not to enter near-by store, which, to her knowledge, had the reputation of being a place that a modest woman could not with propriety enter. *Louisville & N. R. Co. v. Daugherty (Ky.)*, 178.

Of alighting passenger was question for jury. *Hill v. St. Louis, etc., Ry. Co. (Ark.)*, 753.

Question for jury whether passenger was negligent in attempting to alight unassisted. *Mercer v. Cincinnati N. R. Co. (Mich.)*, 615.

Riding on platform, and alighting at time and place which, if he had been inside of car, he would not have done. *Wagner v. Atlantic Coast Line R. Co. (N. Car.)*, 735.

Right of passenger to assume that tracks between the alighting place and a regular station will be free of cars while he is crossing; and effect of his mere failure to look and listen for cars before attempting to cross. *Birmingham Ry., etc., Co. v. Landrum (Ala.)*, 593.

Sitting on car platform. *Wagner v. Atlantic Coast Line R. Co. (N. Car.)*, 735.

Sufficiency of evidence to support plea that passenger assumed the risk by voluntarily and knowingly alighting between stations. *Melton v. Birmingham Ry., etc., Co. (Ala.)*, 768.

Damages.

Ejection of passenger from street car, elements of damages recoverable for. *Birmingham Ry., etc., Co. v. Turner (Ala.)*, 624.

CARRIERS OF PASSENGERS—Continued.

Exemplary damages were recoverable where conductor ejected passenger without giving him an opportunity to explain mistake in punching his ticket. *Illinois Cent. R. Co. v. Gortikov* (Miss.), 650.

Exemplary damages where ejection of passenger was accompanied by willfulness. *Birmingham Ry., etc., Co. v. Lee* (Ala.), 618.

In action for injuries to passenger, there was no error in instruction: "It comes to you in the nature of a warning that you shall be careful, that you shall give her ample compensation for the wrong that has been done her, if you find one has been done." *Birmingham Ry., etc., Co. v. Lee* (Ala.), 618.

Mental and physical pain of ejected passenger, certain instruction as to was not improper. *Birmingham Ry., etc., Co. v. Lee* (Ala.), 618.

Where railroad company obstructed access to its depot causing lady passenger to stand outside exposed to the cold for an unreasonable time, it was liable for resulting injury to her health, though her loss of health was most aggravated by the fact that such exposure was during her menstrual period. *Louisville & N. R. Co. v. Daugherty* (Ky.), 178.

\$287 was not excessive verdict for ejection of sick passenger from street car. *Birmingham Ry., etc., Co. v. Turner* (Ala.), 624.

Degree of Care.

Care due passengers riding in caboose or other car attached to local freight train. *Chicago, etc., Ry. Co. v. Ralston* (Kan.), 701.

Collision caused by obstruction on track, carrier could not escape liability for injury to passenger resulting therefrom, merely because the obstruction was caused by agency over which it had no control. *Walters v. Seattle, etc., Ry. Co.* (Wash.), 185.

Duty to discover and remove obstructions on track. *Walters v. Seattle, etc., Ry. Co.* (Wash.), 185.

Mixed trains, duty of carrier as regards safety of the cars of. *Morgan v. Chesapeake & O. Ry. Co.* (Ky.), 679.

Discharging Passengers.

Calling station as invitation to alight at next stop. *Wagner v. Atlantic Coast Line R. Co.* (N. Car.), 735.

Failure to let street car passenger off at a regular and safe stopping place, on a dark night, as negligence. *Melton v. Birmingham Ry., etc., Co.* (Ala.), 768.

Liability on account of failure to assist disabled passenger to alight. *Mercer v. Cincinnati N. R. Co.* (Mich.), 615.

Passenger's right to infer that first stop will be for station that has been called. *Wagner v. Atlantic Coast Line R. Co.* (N. Car.), 735.

Speed of car which struck passenger after he alighted at regular station could be considered on question of carrier's negligence. *Birmingham Ry., etc., Co. v. Landrum* (Ala.), 593.

Wanton negligence in motorman to run his car at high rate of speed on entering station and passing another car on an adjoining track, which had stopped or was stopping to discharge passengers. *Birmingham Ry., etc., Co. v. Landrum* (Ala.), 593.

CARRIERS OF PASSENGERS—Continued.**Ejection.**

Additional damages cannot be recovered on account of use of force in ejecting passenger from street car made necessary by his resistance. *Morrill v. Minneapolis St. Ry. Co. (Minn.)*, 629.

Conductor was not entitled to eject plaintiff without giving him an opportunity to identify himself as original purchaser of the ticket, merely because the selling agent by mistake punched the ticket for a female instead of male, where the ticket described plaintiff as having a mustache. *Illinois Cent. R. Co. v. Gortikov (Miss.)*, 650.

Duty of passenger to leave street car without insisting upon application of actual force. *Morrill v. Minneapolis St. Ry. Co. (Minn.)*, 629.

Effect of fact that another passenger offered to pay plaintiff's fare, and she would not permit it. *Birmingham Ry., etc., Co. v. Lee (Ala.)*, 618.

Passenger could maintain action in tort for damages resulting from her expulsion from street car, and was not limited to action for breach of contract to carry. *Morrill v. Minneapolis St. Ry. Co. (Minn.)*, 629.

Refusal of passenger to pay fare or deliver ticket until he received baggage check, railroad was liable for his ejection. *Tarr v. Oregon Short Line R. Co. (Idaho)*, 98.

Right of action, whether complete when passenger is ordered to leave car. *Morrill v. Minneapolis St. Ry. Co. (Minn.)*, 629.

Sufficiency of complaint averring negligence of conductor in incorrectly punching street railway transfer. *Birmingham Ry., etc., Co. v. Turner (Ala.)*, 624.

Transfer, liability for failure of conductor to issue a serviceable one. *Birmingham Ry., etc., Co. v. Turner (Ala.)*, 624.

Foreign Cars.

Carrier was liable for injuries to its passenger resulting from defect in foreign car, under the rule that a carrier of passengers is liable for all defects in its vehicles existing at the time of construction, as well as those which may exist afterwards, and be discovered on investigation. *Morgan v. Chesapeake & O. Ry. Co. (Ky.)*, 679.

Manufacturer's negligent failure to make proper tests to discover defects in axle on foreign car was imputable to the carrier transporting such car as part of its train, and rendered the carrier liable for injuries to its passenger. *Morgan v. Chesapeake & O. Ry. Co. (Ky.)*, 679.

Pleading.

General allegation that derailment of passenger's car was caused by carrier's negligence, sufficiency of. *Herbert v. Portland R. Co. (Me.)*, 512.

Presumption of Negligence.

Injured passenger did not waive her right to rely upon, by particularly alleging the cause of the accident. *Walters v. Seattle, etc., Ry. Co. (Wash.)*, 185.

Passenger injured as result of breakage in car, extent of burden of proof imposed upon carrier in order to escape liability *Morgan v. Chesapeake & O. R. Co. (Ky.)*, 679.

CARRIERS OF PASSENGERS—Continued.**Proximate Cause.**

- Common carrier cannot be held liable for failing to provide against a possible injury which could not have been reasonably anticipated. *Keeshan v. Elgin, etc., Co.* (Ill.), 562.
- Right of passenger to ride to end of street car line to which, under city ordinances, he is entitled to be transferred. *Morrill v. Minneapolis St. Ry. Co.* (Minn.), 629.

Who Are Passengers.

- Alighting from car during journey. *Zeccardi v. Yonkers R. Co.* (N. Y.), 771.
- Application of rule that person is entitled to protection as a passenger until he has had a reasonable time to leave station premises. *Taylor v. Atlantic Coast Line R. Co.* (S. Car.), 774.
- Beginning of relation. *Hogner v. Boston Elev. Ry. Co.* (Mass.), 756.
- Boy invited by sectionmen to ride on hand car was not a passenger, although the foreman ordered the hands to help the boy on the car. *Daugherty v. Chicago, etc., Ry. Co.* (Iowa), 558.
- Certain facts justified inference that passbook was part of the consideration for car inspector's services, and that his transportation by his employer railroad company was not gratuitous. *Eberts v. Detroit, etc., Ry. Co.* (Mich.), 159.
- Effect of forcing way onto street car against carrier's will. *Hogner v. Boston Elev. Ry. Co.* (Mass.), 756.
- Employee riding to work in street car of his employer. *Herbert v. Portland R. Co.* (Me.), 512.
- Existence of relation was question for jury. *Hogner v. Boston Elev. Ry. Co.* (Mass.), 756.
- One intending to become a passenger, who had not within a reasonable time prior to the arrival of the train placed himself on platform provided for passengers. *Gregg v. Northern Pac. Ry. Co.* (Wash.), 519.
- Plaintiff was still a passenger when injured; and, though carrier was not bound to hold train in first instance, the brakeman having granted plaintiff permission to re-enter the car, it was his duty to hold train for sufficient length of time to enable plaintiff to re-alight in safety. *Hill v. St. Louis, etc., Ry. Co.* (Ark.), 753.
- Street car passenger, termination of relation of. *Melton v. Birmingham Ry., etc., Co.* (Ala.), 768.
- Termination of relation. *Hill v. St. Louis, etc., Ry. Co.* (Ark.), 753.
- What is reasonable time and opportunity for passenger to alight safely and leave carrier's premises is generally question for jury. *Hill v. St. Louis, etc., Ry. Co.* (Ark.), 753.

CHILDREN.

See CARRIERS OF PASSENGERS; FENCES.

- Burden of proving existence of excusing cause where young child is found to have been run over by train backing through streets of town, without a lookout. *Hollins v. New Orleans, etc., R. Co.* (La.), 283.

Contributory Negligence.

- Child between 7 and 14 years of age is prima facie incapable of exercising judgment and discretion, and, therefore, incapable

CHILDREN—Continued.

- of being guilty of contributory negligence, but such capacity may be shown. *Birmingham Ry., etc., Co. v. Landrum* (Ala.), 593.
- Degree of care required of child for its own protection. *Gesas v. Oregon Short Line R. Co.* (Utah), 305.
- It is not the ability to appreciate danger which might make a child between 7 and 14 years of age responsible for contributory negligence, but it must be a maturity and discretion beyond its years which would lead it to take care. *Birmingham Ry., etc., Co. v. Landrum* (Ala.), 593.
- Of child 8 years old in attempting to cross between cars obstructing crossing was question for jury. *Gesas v. Oregon Short Line R. Co.* (Utah), 305.
- Of parents of five year old boy in allowing him to go on street in business part of city unattended, effect of. *Saxton v. Pittsburgh Ry. Co.* (Pa.), 603.
- Responsibility of 11 year old child for contributory negligence cannot be based upon sole fact that he had sufficient age and discretion to know the danger of going upon a street railway track without stopping, looking or listening for cars. *Birmingham Ry., etc., Co. v. Landrum* (Ala.), 593.
- Death was caused by a thing dangerous and attractive to children, where child was killed by a car falling on him while on railroad property; and railroad was chargeable with knowledge that children would be attracted by the car. *Gates v. Northern Pac. Ry. Co.* (Mont.), 580.
- Negligence of sectionmen, in permitting child to ride on hand car in a dangerous position, did not tend to show such wanton or malicious conduct on the part of such employees as would justify recovery against their railroad company. *Daugherty v. Chicago, etc., Ry. Co.* (Iowa), 558.
- Railroad could not be held liable for injury to child, permitted to ride on hand car by sectionmen, either on the theory of the turntable cases, or that car was a dangerous agency and that the railroad was responsible for the acts of its agents in charge thereof. *Daugherty v. Chicago, etc., Ry. Co.* (Iowa), 558.

COMMON CARRIERS.

See **FIRES SET BY LOCOMOTIVES; LICENSEES.**

- Burden of proof was on carrier to show that plaintiff received a certain voucher for the value of the freight as payment of loss. *Moody v. Southern Ry. Co.* (S. Car.), 706.
- Certain period was not reasonable time within which railroad's liability should be changed from that of carrier to that of warehouseman. *Central of Georgia Ry. Co. v. Merrill & Co.* (Ala.), 786.
- Consignee's duty to receive freight without unreasonable delay. *McGregor v. Oregon R. Co.* (Ore.), 374.
- Consignee's right, as vendee, to sue carrier for failure to deliver freight, after rescission of sale contract. *Matheson v. Southern Ry. Co.* (S. Car.), 130.
- Constitutionality of certain penal statute requiring carrier to adjust a loss within a certain time. *Morris-Scarboro-Moffitt Co. v. Southern Express Co.* (N. Car.), 122.
- Constitutionality of certain statute providing penalty to be paid consignee by carrier for failure to adjust and pay within certain time claim for loss of freight. *Coffey & Rigby v. Atlantic Coast Line R. Co.* (S. Car.), 96.

COMMON CARRIERS—Continued.

Court properly refused to charge, as a matter of law, that plaintiff's failure to return a certain voucher for the value of the freight estopped him from claiming the value of the goods from the carrier and a certain statutory penalty. *Moody v. Southern Ry. Co. (S. Car.)*, 706.

Damages.

Acceptance by connecting carrier of carload of buggies for delivery is not notice to the carrier as to the only time buggies could be sold at place of delivery, so as to warrant recovery of loss of profits by delay in shipment. *Brand v. Illinois Cent. R. Co. (Ky.)*, 136.

Interest on amount of loss or damage to freight, extent of liability for under certain penal statute. *Winslow Bros. & Co. v. Atlantic C. L. R. Co. (S. Car.)*, 116.

Loss of profits from delay not recoverable, unless carrier had notice, at time of delivery of shipment, of use for which goods were intended. *Brand v. Illinois Cent. R. Co. (Ky.)*, 136.

Market value of souvenirs when shipped was measure of damages from failure of carrier to deliver them in reasonable time, where they were without market value when delivered, because of such delay, although carrier was not informed as to contents of box in which they were shipped. *Lambert-Murray Co. v. Southern Express Co. (N. Car.)*, 138.

Mental anguish from delay in transportation of corpse, damages for could not be recovered, in the absence of willful or malicious misconduct. *Beaulieu v. Great Northern Ry. Co. (Minn.)*, 572.

Notice to initial carrier that goods are to be used for a certain purpose is not notice to connecting carrier, so as to be a basis of recovery of loss of profits from delay in shipment. *Brand v. Illinois Cent. R. Co. (Ky.)*, 136.

Punitive damages for loss of freight, when, and when not, recoverable. *Matheson v. Southern Ry. Co. (S. Car.)*, 130.

Special damages for carrier's failure to deliver fertilizer were not recoverable, the carrier, after notice of special use to which it was to be applied, having made diligent and prompt effort to find and deliver it. *Matheson v. Southern Ry. Co. (S. Car.)*, 130.

Special damages for carrier's failure to deliver fertilizer were not recoverable, the carrier not having been notified as to special circumstances. *Matheson v. Southern Ry. Co. (S. Car.)*, 130.

Defective loading or packing of freight by consignor, liability of carriers for damages from. *Gulf, etc., Ry. Co. v. Wittnebert (Tex.)*, 780.

Defendant's liability was that of a carrier where the freight was destroyed by fire on the night after the consignee had been told that is could not be delivered to him until the next day. *Fisher v. Northern Pac. Ry. Co. (Wash.)*, 763.

Defense by carrier that part of the lost freight did not belong to plaintiff could not be proved where not specially pleaded. *McGregor v. Oregon R. Co. (Ore.)*, 374.

Definition of common carrier. *State v. Union Stock Yards Co. (Neb.)*, 689.

Delay.

Plaintiff was bound to receive the freight when tendered by the carrier notwithstanding the delay, the carrier's liability being to render compensation for damages growing out of the delay, and not for loss of the flour. *Moody v. Southern Ry. Co. (S. Car.)*, 706.

COMMON CARRIERS—Continued.

Duty of railroad to inspect manner of loading of loaded car received from consignor or another railroad company. *Gulf, etc., Ry. Co. v. Wittnebert* (Tex.), 780.

Limiting Liability.

Bill of lading executed and sent to shipper after loss of the freight. *McGregor v. Oregon R. Co.* (Ore.), 374.

Burden is on carrier to allege and prove a limited liability contract. *McGregor v. Oregon R. Co.* (Ore.), 374.

Delay in transporting, power of carrier, under certain statute, to avoid or limit its liability for. *Siemonsma v. Chicago, etc., Ry.* (Iowa), 140.

Effect of mere notice by carrier to shipper. *McGregor v. Oregon R. Co.* (Ore.), 374.

Evidence supported finding that plaintiff never entered into a special contract, evidenced by a bill of lading, limiting the carrier's liability. *McGregor v. Oregon R. Co.* (Ore.), 374.

Finding that a stipulation requiring notice within 10 days of claim for damage is reasonable was a mere conclusion of law. *Houtz v. Union Pac. R. Co.* (Utah), 663.

Nature of carrier's right to limit its liability. *Houtz v. Union Pac. R. Co.* (Utah), 663.

Negligence. *Central of Georgia Ry. Co. v. Merrill & Co.* (Ala.), 786.

Negligence of carrier or misconduct of its servants. *Houtz v. Union Pac. R. Co.* (Utah), 663.

Order of proof where carrier relies on a limited liability contract. *McGregor v. Oregon R. Co.* (Ore.), 374.

Value of freight at point of shipment, validity of clause of bill of lading limiting carrier's liability to. *Matheson v. Southern Ry. Co.* (S. Car.), 130.

Where a contract for the shipment of sheep limits the carrier's liability to loss from willful or gross negligence, a paragraph requiring the presentation of a claim within 10 days as a condition of liability must be construed as referring only to claims for willful or gross negligence. *Houtz v. Union Pac. R. Co.* (Utah), 663.

Loss of freight, sufficiency of evidence of. *DeLorme v. Atlantic C. L. R. Co.* (S. Car.), 97.

Payment of loss, whether plaintiff's receipt and retention of a voucher for the value of the goods constituted was question for jury. *Moody v. Southern Ry. Co.* (S. Car.), 706.

Proximate Cause.

It is not necessary to the liability of a common carrier for injury resulting from an act of its servants that they should be able to anticipate the particular injury which might result. *Keeshan v. Elgin, etc., Co.* (Ill.), 562.

Rates.

Power of railroad or shipper to make valid contract for less freight rate than the public schedule filed with the Interstate Commerce Commission. *Pecos Valley & N. E. Ry. Co. v. Harris* (N. Mex.), 767.

Reasonable time for consignee to accept shipment, what is. *Central of Georgia Ry. Co. v. Merrill & Co.* (Ala.), 786.

Rights, duties and obligations created by a contract of shipment are questions of law for the court. *Chicago, B. & Q. R. Co. v. Morris* (Wyo.), 654.

COMMON CARRIERS—Continued.

Stock yards company was a common carrier within meaning of certain constitutional amendment. *State v. Union Stock Yards Co. (Neb.)*, 689.

Termination of Liability.

Duty to notify consignee of arrival of freight. *McGregor v. Oregon R. Co. (Ore.)*, 374.

Loss occurred before the expiration of a reasonable time for the removal of the goods by consignee, as a matter of law. *McGregor v. Oregon R. Co. (Ore.)*, 374.

Reasonableness of opportunity afforded consignee to remove freight, whether question for court or jury. *McGregor v. Oregon R. Co. (Ore.)*, 374.

Terminating of liability as common carrier, and beginning of liability as warehouseman, after arrival of freight at destination. *McGregor v. Oregon R. Co. (Ore.)*, 374.

Termination of liability as common carrier and beginning of liability as warehouseman. *Central of Georgia Ry. Co. v. Merrill & Co. (Ala.)*, 786.

Warehouseman's liability of railroad does not commence till after the consignee has had an opportunity to remove the goods from its possession. *Fisher v. Northern Pac. Ry. Co. (Wash.)*, 763.

Where vendor undertakes to deliver at certain place, delivery to carrier is not delivery to consignee entitling him to sue for a loss, but carriage to such point is at vendor's risk, and he alone may sue carrier for loss. *Matheson v. Southern Ry. Co. (S. Car.)*, 130.

Who are common carriers within meaning of certain statute. *State v. Union Stock Yards Co. (Neb.)*, 689.

CONCURRENT NEGLIGENCE.

See MASTER AND SERVANT.

CONNECTING CARRIERS.

See COMMON CARRIERS; GARNISHMENT; INTERSTATE COMMERCE; LICENSEES.

Constitutionality of certain statute purporting to render a connecting carrier liable for damages to freight sustained while on the line of another carrier. *Lewis v. Atlantic Coast Line R. Co. (S. Car.)*, 687.

Evidence.

Under certain "tracing act," evidence as to the diligence actually exercised by carrier in an effort to trace the goods and ascertain on what line they were lost, damaged or destroyed, was competent. *Moody v. Southern Ry. Co. (S. Car.)*, 706.

Instruction was erroneous as ignoring provision of certain statute exonerating terminal carrier from liability for loss not occurring on its own line, if, after due diligence, it is unable to trace the line on which the loss occurred. *Winslow Bros. & Co. v. Atlantic C. L. R. Co. (S. Car.)*, 116.

Limiting Liability.

Burden on terminal carrier to show that loss of the mule did not occur on its lines. *Winslow Bros. & Co. v. Atlantic C. L. R. Co. (S. Car.)*, 116.

Certain bill of lading constituted a contract in effect to deliver the freight to the connecting carrier "in good order," and was therefore within certain statute. *Moody v. Southern Ry. Co. (S. Car.)*, 706.

CONNECTING CARRIERS—Continued.

Under certain bill of lading each carrier became liable for loss or damage only on its own line; and such liability terminated on delivery of the goods to the next carrier in the same order in which the preceding carrier received them. *Moody v. Southern Ry. Co. (S. Car.)*, 706.

Under the bill of lading, carrier on whose line loss did not occur could not be charged with penalty, imposed by statute, for refusal to pay for a loss within a certain time. *Moody v. Southern Ry. Co. (S. Car.)*, 706.

Presumption was that injury to mules occurred while they were in terminal carrier's possession. *Winslow Bros. & Co. v. Atlantic C. L. R. Co. (S. Car.)*, 116.

Under certain "tracing act," terminal carrier was entitled to instruction exonerating it from loss in question, if the information given was all that it could give after the exercise of due diligence, though it was not as specific as required by certain section of the statute. *Winslow Bros. & Co. v. Atlantic C. L. R. Co. (S. Car.)*, 116.

CONSTITUTIONAL LAW.

See BAGGAGE; COMMON CARRIERS; CONNECTING CARRIERS; INTERSTATE COMMERCE; STREET RAILWAYS; TICKETS AND FARES.

CONTRACTORS.

SEE LIENS.

CONTRIBUTORY NEGLIGENCE.

See CARRIERS; CROSSINGS; DEATH BY WRONGFUL ACT; FELLOW SERVANTS; FIRES SET BY LOCOMOTIVES; FRIGHTENING TEAMS; IMPUTED NEGLIGENCE; MASTER AND SERVANT; NEGLIGENCE; STATIONS AND DEPOTS; STOCK, INJURIES TO; TRESPASSERS.

Intoxication, effect of on degree of care required of person for his own protection. *Keeshan v. Elgin, etc., Co. (Ill.)*, 562.

Sufficiency of facts alleged in answer was question of law. *Southern Ry. Co. v. Dickens (Ala.)*, 280.

When a defense to an action for negligence of defendant after discovering peril of person injured. *Southern Ry. Co. v. Stewart (Ala.)*, 606.

When question of law. *Kath v. East St. Louis, etc., Ry. Co. (Ill.)*, 365.

When question of should not be submitted to jury. *Wagner v. Atlantic Coast Line R. Co. (N. Car.)*, 735.

Withdrawal of issue by trial court. *Gregg v. Northern Pac. Ry. Co. (Wash.)*, 519.

CORPORATIONS.

See RAILROADS.

CROSSINGS.

See CHILDREN; LICENSEES; MASTER AND SERVANT; TRESPASSERS.

Contributory Negligence.

Burden of proving it on part of highway traveler was not imposed upon railroad because of its negligence in running the train. *Southern Ry. Co. v. Hansbrough's Adm'x (Va.)*, 1.

CROSSINGS—Continued.

- Effect of, erroneous instruction as to. *Southern Ry. Co. v. Hansbrough's Adm'x (Va.)*, 1.
- Negligent in highway traveler to enter on track when the exercise of his faculties would have warned him of approach of train, though he was oblivious of train. *Southern Ry. Co. v. Hansbrough's Adm'x (Va.)*, 1.
- Instruction was misleading, because calculated to create in minds of jury the belief that there was no evidence of decedent's negligence, and authorized a verdict on presumption of due care on part of deceased instead of on the facts proven. *Southern Ry. Co. v. Hansbrough's Adm'x (Va.)*, 1.
- Instruction was misleading, since all defendant railroad was required to do was to show circumstances from which reasonable men might draw the inference, that, had decedent looked or listened, he would have seen or heard the train approaching in time to have avoided the injury, notwithstanding its own negligence in running the engine at excessive speed. *Southern Ry. Co. v. Hansbrough's Adm'x (Va.)*, 1.
- Lookout for danger, mutual duty of railroad and highway traveler to maintain. *Southern Ry. Co. v. Hansbrough's Adm'x (Va.)*, 1.
- Negligence in running train towards crossing must have been sole proximate cause of highway traveler's death, to warrant recovery therefor, unless he was lulled into security by reason of such negligence. *Southern Ry. Co. v. Hansbrough's Adm'x (Va.)*, 1.
- Negligence of railroad was question for jury, in action for injury sustained in attempting to pass between cars obstructing crossing. *Gesas v. Oregon S. L. R. Co. (Utah)*, 305.

Signals.

- Evidence warranted a finding that the trainmen ought to have anticipated that persons might be in the act of crossing between cars of train obstructing crossing, and that not to give warning before moving train would result in injury. *Gesas v. Oregon S. L. R. Co. (Utah)*, 305.
- Failure to give statutory signals at crossing, whether negligence or evidence of negligence, under law of Georgia, where train collides with hand car three-quarters of a mile from the crossing. *Bussey v. Charleston, etc., Ry. Co. (S. Car.)*, 244.
- Failure to give warning before starting train obstructing crossing, whether negligence. *Gesas v. Oregon S. L. R. Co. (Utah)*, 305.

Speed.

- Violation of speed ordinance must have been sole proximate cause of death of highway traveler to create cause of action. *Southern Ry. Co. v. Hansbrough's Adm'x (Va.)*, 1.

Stop, Look, and Listen.

- Highway traveler's duty to look and listen for trains. *Southern Ry. Co. v. Hansbrough's Adm'x (Va.)*, 1.

CROSSINGS OF RAILROADS.

- Same degree of care is required in operation of a freight train at an intersection of tracks as that required of a passenger train. *Van Orman v. Lake Shore & M. S. Ry. Co. (Mich.)*, 747.

CUSTOM AND USAGE.

- See STREET RAILWAYS.

DAMAGES.

See CARRIERS; COMMON CARRIERS; DEATH BY WRONGFUL ACT; EMINENT DOMAIN; PERSONAL INJURIES; RIGHT OF WAY; TRIAL.

It is proper to instruct that jury cannot, in awarding damages, go beyond the amount claimed in the complaint. *Birmingham Ry., etc., Co. v. Lee* (Ala.), 618.

Mental anguish, when damages for are recoverable in action for breach of contract. *Beaulieu v. Great Northern Ry. Co.* (Minn.), 572.

Physical and mental pain, etc., measure of damages for is for determination of jury. *Tarr v. Oregon Short Line R. Co.* (Idaho), 98.

DEATH BY WRONGFUL ACT.**Burden of Proof.**

Is on plaintiff to make out a case against a railroad company for running a train over his intestate. *Southern Ry. Co. v. Stewart* (Ala.), 606.

Damages.

Charge as an entirety was not misleading as authorizing double damages. *Goodes v. Lansing, etc., Traction Co.* (Mich.), 318.

Under law of Georgia, jury are not limited to mortality and annuity tables in estimating value of a life. *Bussey v. Charleston, etc., Ry. Co.* (S. Car.), 244.

Presumption that employee of shipper when going around the car he was loading, to the point where he was killed, was acting through a sense of duty to assist in any emergency that might arise. *Chicago, etc., Ry. Co. v. Pritchard* (Ind.), 146.

EMINENT DOMAIN.

See RIGHT OF WAY.

Additional Servitude.

Additional use of land subject to railroad right of way, when statute of limitations is no protection to railroad company. *McCulloch v. North Carolina R. Co.* (N. Car.), 330.

Issues in action against railroad company (which was lessee of company owning a right of way across plaintiff's lot) for taking additional land for trackage purposes, etc., foreign to the use of the leased railroad. *McCulloch v. North Carolina R. Co.* (N. Car.), 330.

Lessee railroad was not entitled to use its easement for trackage or warehouse purposes for any traffic in which lessor railroad had no part or interest without making compensation to land owner as for an additional burden on his land, but the additional traffic over the lessor road, though originating on the lessee's other railroads, was not a subject of compensation. *McCulloch v. North Carolina R. Co.* (N. Car.), 330.

Public Use.

Spur track to private industry, which contributed to its cost. *Hairston v. Danville, etc., Ry. Co.* (U. S.), 344.

EMPLOYERS' LIABILITY ACTS.

See FELLOW SERVANTS; INTERSTATE COMMERCE.

Brakeman on freight train was not under direct control of engineer, within S. Car. Const. 1895, art. 9, § 15. *Pagan v. Southern Ry. Co.* (S. Car.), 254.

EMPLOYERS' LIABILITY ACTS—Continued.

Railroad company is liable for injury to an employee from negligence of his fellow servants, under Civ. Code Ga. 1895, § 2610.

Bussey v. Charleston, etc., Ry. Co. (S. Car.), 244.

Switch targets are not "signals," within Burns' Ann. St. 1901, § 7083, cl. 4. *Chicago, etc., Ry. Co. v. Barker (Ind.), 228.*

EVIDENCE.

See **CARRIERS; CROSSINGS; MASTER AND SERVANT; NEGLIGENCE; RAILROAD COMMISSIONS.**

Speed.

Fact that witness was a passenger on electric car did not render him incompetent to testify as to its speed. *Goodes v. Lansing, etc., Traction Co. (Mich.), 318.*

EXEMPTION FROM LIABILITY.

See **LIMITING LIABILITY.**

FEDERAL JURISDICTION.

See **TICKETS AND FARES.**

FELLOW SERVANTS.

See **EMPLOYERS' LIABILITY ACTS; MASTER AND SERVANT.**

Assignable and nonassignable duties of master to servant. *Chicago, etc., Ry. Co. v. Barker (Ind.), 228.*

Burden of proving that those in same employment are not fellow servants. *Chicago, etc., Ry. Co. v. Barker (Ind.), 228.*

Complaint, in action for death of engineer by running of train into open switch, alleging that section foreman was charged with duty of keeping track in repair, did not show that such foreman was a vice principal while engaged in operating the switch. *Chicago, etc., Ry. Co. v. Barker (Ind.), 228.*

Contributory negligence of fellow servant, doctrine of cannot be invoked by stranger against the injured party. *Nonn v. Chicago City Ry. Co. (Ill.), 532.*

Engineer is a vice principal, and not fellow servant of his fireman, within S. Car. Const. 1895, art. 9, § 15. *Pagan v. Southern Ry. Co. (S. Car.), 254.*

Fellow servant rule, prior to adoption of S. Car. Const. 1895, was applicable to railroads. *Pagan v. Southern Ry. Co. (S. Car.), 254.*

It is the act itself that characterizes the performer as a vice principal or a fellow servant, and not the title of the actor, or the fact that he does superior duties. *Chicago, etc., Ry. Co. v. Barker (Ind.), 228.*

Members of train crew or switching crew are not fellow servants as a matter of law. *Chicago, etc., Ry. Co. v. Strong (Ill.), 263.*

Question for jury whether member of switching crew gave signals, as vice principal or fellow servant of another member of the crew. *Chicago, etc., Ry. Co. v. Strong (Ill.), 263.*

Section foreman and engineer. *Chicago, etc., Ry. Co. v. Barker (Ind.), 228.*

Street railway's superintendent as fellow servant of its car barn watchman, who was injured by falling of piece of coal from bin. *Lapre v. Woronoco St. Ry. Co. (Mass.), 210.*

Switch, opening and closing of is a detail which a railroad company may delegate to other servants. *Chicago, etc., Ry. Co. v. Barker (Ind.), 228.*

FELLOW SERVANTS—Continued.

Test of fellow service. *Pagan v. Southern Ry. Co. (S. Car.)*, 254.
 When any duty connected with operating a part of an appliance is delegated to a servant, such servant becomes a fellow servant of all those engaged by the master in carrying on the common enterprise. *Chicago, etc., Ry. Co. v. Barker (Ind.)*, 228.

FENCES.

See **STOCK, INJURIES TO.**

Certain statute does not require railroad to maintain a fence sufficient to prevent persons from trespassing upon its track, though they may be of tender age. *Bischof v. Illinois Southern Ry. Co. (Ill.)*, 797.

Certain statute imposes on railroad companies the absolute duty of maintaining fences to keep stock off their tracks; and its violation may render a railroad liable for injuries to passengers or employees resulting from stock being on track. *Bischof v. Illinois Southern Ry. Co. (Ill.)*, 797.

Certain statute requiring railroads to fence their tracks was enacted for whose benefit. *Rinehart v. Kansas City So. Ry. Co. (Mo.)*, 47.

Under certain statute a railroad company may not at its option elect to fence its right of way or elect to assume liability for killing stock on its choosing not to fence. *Bischof v. Illinois Southern Ry. Co. (Ill.)*, 797.

FIRES.

See **NEGLIGENCE.**

FIRES SET BY LOCOMOTIVES.**Combustibles.**

Negligence in allowing them to accumulate on railroad right of way is, at common law, a question for jury. *Illinois Cent. R. Co. v. Siler (Ill.)*, 566.

Contributory Negligence.

Duty of owner to protect property from fire caused by railroad's negligence. *Illinois Cent. R. Co. v. Siler (Ill.)*, 566.

Limiting Liability.

Application of S. Car. Civ. Code 1902, § 2135, making every railroad company responsible for property destroyed by fire from its locomotives, unless the property was placed on the right of way unlawfully and without its consent, effect of certain agreement between carrier and shipper. *German-American Ins. Co. v. Southern Ry. Co. (S. Car.)*, 611.

Negligence in not looking for and discovering hose across its tracks for purpose of carrying water to extinguish fire cannot be charged against railroad. *Clark v. Grand Trunk W. Ry. Co. (Mich.)*, 790.

Negligence in running train over fire hose rendered railroad liable for loss of property by fire. *Clark v. Grand Trunk W. Ry. Co. (Mich.)*, 790.

Negligence of railroad, when question of law for the court, under Mich. Comp. Laws, § 6293, providing, in effect, that railroads shall not be liable for fires in absence of negligence. *Dolph v. Lake Shore & M. S. Ry. Co. (Mich.)*, 299.

Origin of fire, sufficiency of evidence of. *Clark v. Grand Trunk W. Ry. Co. (Mich.)*, 790.

FIRES SET BY LOCOMOTIVES—Continued.

Personal injuries sustained by owner of property in attempting to extinguish fire, liability of negligent railroad. Illinois Cent. R. Co. *v.* Siler (Ill.), 566.

Proximate cause where person was burned to death while attempting to extinguish fire resulting from railroad's negligence in allowing combustibles to accumulate on its right of way. Illinois Cent. R. Co. *v.* Siler (Ill.), 566.

Question for jury whether engine was in good order and properly managed. Clark *v.* Grand Trunk W. Ry. Co. (Mich.), 790.

FOREIGN CARS.

See CARRIERS OF PASSENGERS.

FRANCHISES.

See NEGLIGENCE; STREET RAILWAYS.

FREIGHT TRAINS.

See CARRIERS OF PASSENGERS.

FRIGHTENING TEAMS.

See IMPUTED NEGLIGENCE.

Carcass of horse lying on defendant railroad's right of way near public road, fact that crews of two or more freight trains had passed the carcass during the morning, before its removal and before plaintiff was injured by his horses becoming frightened at it, was insufficient to charge defendant with notice of its presence. Louisville & N. R. Co. *v.* Armstrong (Ky.), 40.

Carcass of horse lying on defendant railroad's right of way near public road, reasonable time for removal of after notice. Louisville & N. R. Co. *v.* Armstrong (Ky.), 40.

Carcass of horse lying on defendant railroad's right of way near public road, what proof of negligence essential to recovery for plaintiff's injuries resulting from fright of his team. Louisville & N. R. Co. *v.* Armstrong (Ky.), 40.

Carcass of horse lying on railroad right of way near public road crossing, petition was fatally defective for failure to allege that defendant railroad knew of the presence of carcass on its right of way, or that it had remained there an unreasonable length of time, or long enough for defendant to have removed it before the accident. Louisville & N. R. Co. *v.* Armstrong (Ky.), 40.

Contributory Negligence.

Plaintiff was negligent as matter of law, so as to preclude recovery, in attempting to force his horses past carcass of horse. Louisville & N. R. Co. *v.* Armstrong (Ky.), 40.

Noise made by steam escaping from locomotive, petition was not open to general demurrer on ground that it did not allege it was unnecessary. Brunswick & B. R. Co. *v.* Hoodenpyle (Ga.), 37.

Unusual noises in running trains, liability of railroad. Brunswick & B. R. Co. *v.* Hoodenpyle (Ga.), 37.

Where plaintiff's team were frightened at carcass of horse lying on railroad's right of way near public road, the killing of the horse by one of defendant's trains was not proximate cause of plaintiff's injuries resulting from such frightening of his team. Louisville & N. R. Co. *v.* Armstrong (Ky.), 40.

GARNISHMENT.

Fact that an indebtedness due to a nonresident railroad company arose out of the conducting of interstate commerce does not ex-

GARNISHMENT—Continued.

- empt it from garnishment under a foreign attachment. *Johnson v. Union Pac. R. Co. (R. I.)*, 537.
- Freight cars of a company whose lines of road are in other states, whether they were subject to garnishment of another company, within the state. *Johnson v. Union Pac. R. Co. (R. I.)*, 537.
- Freight money in hands of final carrier belongs to nonresident initial carrier, whether subject to. *Johnson v. Union Pac. R. Co. (R. I.)*, 537.
- Where certain railroad property was subject to. *Johnson v. Union Pac. R. Co. (R. I.)*, 537.

HACKMEN.

See STATIONS AND DEPOTS.

IMPUTED NEGLIGENCE.

- Evidence showed that driver of wagon struck by street car was in sole charge of the wagon, and that injured person had no control over the driver or movements of the wagon. *Nonn v. Chicago City Ry. Co. (Ill.)*, 532.
- Negligence of driver of wagon was not imputed to another person riding on it when it was struck by street car. *Nonn v. Chicago City Ry. Co. (Ill.)*, 532.
- Occupant of private vehicle injured by reason of the negligence of its driver and that of those operating a street car. *Eckels v. Muttschall (Ill.)*, 553.
- Relation of master and servant, or joint undertakers, existed between plaintiff and his companion, so that plaintiff was chargeable with negligence of latter in trying to force team of horses past carcass of horse. *Louisville & N. R. Co. v. Armstrong (Ky.)*, 40.
- Relation of privity, necessity of. *Nonn v. Chicago City Ry. Co. (Ill.)*, 532.

INDEPENDENT CONTRACTORS.

- Brakeman killed by reason of stepping into trench dug along track for purpose of putting in target signals, his employer railroad was negligent although it may have been dealing with an independent contractor for putting in such signals. *Southern Ry. Co. v. Newton's Adm'r (Va.)*, 528.
- Street railway company may be employed as an independent contractor by another street railway company to clean and repair its cars. *Beckman v. Meadville, etc., Ry. Co. (Pa.)*, 224.
- Traction company, in performing contract to clean and repair defendant's street railway cars, was an independent contractor, and it, and not defendant, was liable to a passenger on one of defendant's cars for the negligence of the servant of the traction company. *Beckman v. Meadville, etc., Ry. Co. (Pa.)*, 224.

INJUNCTIONS.

See STREET RAILWAYS; TICKETS AND FARES.

INTERSECTION OF TRACKS.

See CARRIERS OF PASSENGERS.

INTERSTATE COMMERCE.

See COMMON CARRIERS; GARNISHMENT; TAXATION; TICKETS AND FARES.

State Interference.

Certain statute imposing penalty on a carrier failing to adjust and pay within specified time a claim for loss of freight is

INTERSTATE COMMERCE—Continued.

- not unconstitutional as an interference with interstate commerce. *DeLorme v. Atlantic C. L. R. Co.* (S. Car.), 97.
- Constitutionality of certain penal statute providing that those employed in operating locomotives in Montana shall not be required to work more than a certain number of hours without rest. *State v. Northern Pac. Ry. Co.* (Mont.), 108.
- Constitutionality of certain penal statute requiring carrier to adjust and pay claim for loss of freight within specified time. *Winslow Bros. & Co. v. Atlantic C. L. R. Co.* (S. Car.), 116.
- Constitutionality of certain penal statute requiring carrier to adjust loss within specified time. *Morris-Scarboro-Moffitt Co. v. Southern Express Co.* (N. Car.), 122.
- Constitutionality of certain statute making each carrier agent of its connecting carrier, etc. *Winslow Bros. & Co. v. Atlantic C. L. R. Co.* (S. Car.), 116.
- Constitutionality of certain statute requiring carrier to trace shipments. *Winslow Bros. & Co. v. Atlantic C. L. R. Co.* (S. Car.), 116.
- Powers remaining in the states. *Morris-Scarboro-Moffitt Co. v. Southern Express Co.* (N. Car.), 122.

INTOXICATION.

See CONTRIBUTORY NEGLIGENCE.

JOINT LIABILITY.

See LEASES AND RUNNING POWERS; MASTER AND SERVANT; RAILROADS.

JUDICIAL NOTICE.

That grain coming to Chicago by any railroad may be transferred by means of the belt roads to any warehouse in any part of the city. *People v. Illinois Cent. R. Co.* (Ill.), 722.

JURY.

See TRIAL.

LAST CLEAR CHANCE.

See NEGLIGENCE.

LEASES AND RUNNING POWERS.

Both companies liable where one railroad company negligently caused injury while operating the railroad of another. *Hollins v. New Orleans, etc., R. Co.* (La.), 283.

That a traction company and defendant street railway used jointly tracks which were the property of the traction company, the latter paying the traction company 2½ cents for every passenger carried over its line, did not create a joint obligation of the companies for the safe carriage of defendant's passengers. *Beckman v. Meadville, etc., Ry. Co.* (Pa.), 224.

LICENSEES.

See CHILDREN; DEATH BY WRONGFUL ACT; MASTER AND SERVANT.

Contributory Negligence.

Question for jury. *Calwell v. Minneapolis & St. L. R. Co.* (Iowa), 588.

Defendant, the terminal carrier, was not negligent in failing to ascertain that unloading valve of oil tank car was open before de-

LICENSEES—Continued.

livering the car to the consignee, and, therefore, was not liable for injuries to persons unloading the car. *Gulf, etc., Ry. Co. v. Wittnebert (Tex.)*, 780.

If the defect in the car the shipper's employee was loading and the failure of the railroad to see that the car was in proper condition when delivered to the shipper was the proximate cause of the death of such employee, and he was standing at the point where he was killed rightfully, the railroad was liable, though there was no privity of contract between him and the railroad company. *Chicago, etc., Ry. Co. v. Pritchard (Ind.)*, 146.

Implied license to cross railroad tracks in company's yard, so that in the operation of its trains the company owed to users of certain path the same care it owed the public at a highway or street crossing. *Calwell v. Minneapolis & St. L. R. Co. (Iowa)*, 588.

Original wrong of sectionmen in placing boy in a dangerous position on hand car, for a ride, was the proximate cause of his injury, and, therefore, the railroad company was not liable. *Daugherty v. Chicago, etc., Ry. Co. (Iowa)*, 558.

Proximate cause of death of employee of shipper, who was helping to load flat car with poles, and was thrown upon nearby track by falling of poles, caused by defects in the car, and killed by train, was question for jury. *Chicago, etc., Ry. Co. v. Pritchard (Ind.)*, 146.

Who Are.

Employee of shipper, when he left the place where he was loading a car and went around the car to a point where he could see an approaching train, to render any assistance an emergency might require, was not a trespasser at such point. *Chicago, etc., Ry. Co. v. Pritchard (Ind.)*, 146.

LIENS.

Lienable material furnished in construction and repair of railroad, under certain statute. *Luttrell & Co. v. Knoxville, etc., R. Co. (Tenn.)*, 60.

Lienable materials furnished to subcontractor to be used in construction of railroad culverts and bridges and other improvements, though they were not actually used in the improvements. *Luttrell & Co. v. Knoxville, etc., R. Co. (Tenn.)*, 60.

Lienable railroad materials, what are, and are not, under certain statute of Tennessee. *Luttrell & Co. v. Knoxville, etc., R. Co. (Tenn.)*, 60.

Materials furnished to railroad subcontractor for erection of shanties on lots adjacent to railroad right of way are not lienable under certain statute. *Luttrell & Co. v. Knoxville, etc., R. Co. (Tenn.)*, 60.

Subcontractor was necessary party, in suit to enforce lien on property of railroad company. *Luttrell & Co. v. Knoxville, etc., R. Co. (Tenn.)*, 60.

LIMITING LIABILITY.

See **BILLS OF LADING; CARRIERS; FIRES SET BY LOCOMOTIVES; MASTER AND SERVANT.**

MASTER AND SERVANT.

See CARRIERS OF PASSENGERS; CHILDREN; CROSSINGS; EMPLOYERS' LIABILITY ACTS; FELLOW SERVANTS; INDEPENDENT CONTRACTORS; RELIEF ASSOCIATIONS.

Appliances.

Duty to furnish safe appliances for servant's use. *Louisville & N. R. Co. v. Pendleton's Adm'r* (Ky.), 213.

Assaults.

Evidence justified finding that policeman, at time he committed the assault, was acting as railroad's servant. *Hirst v. Fitchburg, etc., Ry. Co.* (Mass.), 372.

Railroad was not liable, under certain statute, for an assault committed by a policeman. *Hirst v. Fitchburg, etc., Ry. Co.* (Mass.), 372.

Assumption of Risk.

Allegation was defective for failure to show that employee killed by reason of open switch did not assume risk in operating an engine with a cab equipped only with single windows. *Chicago, etc., Ry. Co. v. Barker* (Ind.), 228.

Brakeman crushed between platform dangerously near track and moving car was not sufficiently notified as to existence of the particular obstruction. *Hemmingsen v. Chicago, etc., Ry. Co.* (Wis.), 259.

Electric railway employee killed by collision with pole near railway track. *Kath v. East St. Louis, etc., Ry. Co.* (Ill.), 365.

Fellow servant's negligence. *Pagan v. Southern Ry. Co.* (S. Car.), 254.

Negligence of master. *Kath v. East St. Louis, etc., Ry. Co.* (Ill.), 365.

Obedying order to do dangerous work. *St. Louis, etc.; R. Co. v. Morris* (Kan.), 356.

Ordinance, disobedience of by master. *Chicago & E. R. Co. v. Lawrence* (Ind.), 504.

Risks assumed by servants. *Kath v. East St. Louis, etc., Ry. Co.* (Ill.), 365.

Risks assumed by yard brakeman, in riding on passenger locomotive in returning from his work. *Feneff v. Boston & M. R. R.* (Mass.), 497.

Watchman in street car barn injured by piece of coal falling from bin therein. *Lapre v. Woronoco St. Ry. Co.* (Mass.), 210.

When question of law. *Kath v. East St. Louis, etc., Ry. Co.* (Ill.), 365.

Contributory Negligence.

Choosing extra hazardous method of performing duty. *Kath v. East St. Louis, etc., Ry. Co.* (Ill.), 365.

Duty of railroad employee to look for approaching trains before attempting to cross track. *Dyerson v. Union Pac. R. Co.* (Kan.), 15.

Duty to look for trains before attempting to cross track, railroad employee was not relieved from by fact that he knew it had previously been the rule and practice of his employer to run trains along such track only in one direction except under unusual circumstances, although a change has been made in such rule and practice without notice to him. *Dyerson v. Union Pac. R. Co.* (Kan.), 15.

Finding of switchman's freedom from contributory negligence

MASTER AND SERVANT—Continued.

- was authorized by the evidence, in action for his death caused by being caught between engine and a car which he had kicked onto a spur. *Chicago & E. R. Co. v. Lawrence* (Ind.), 504.
- Jury were warranted in finding that yard brakeman was not bound to anticipate that, without waiting, as usual, for the passing of the passenger engine then due, the switch engine would attempt to use the track. *Feneff v. Boston & M. R. R.* (Mass.), 497.
- Not negligence per se for brakeman to sit down on new kind of brake, when he did not know that it differed from other brakes. *Southern Ry. Co. v. Isom* (Miss.), 288.
- Obedience to order to do dangerous work. *St. Louis, etc., R. Co. v. Morris* (Kan.), 356.
- Question for jury where brakeman was crushed between platform and moving freight car. *Hemmingsen v. Chicago, etc., Ry. Co.* (Wis.), 259.
- Right of brakeman to act upon assumption that car was furnished with ordinary and proper appliances for safety of employees in performing their duties. *St. Louis, etc., R. Co. v. Morris* (Kan.), 356.
- Rule that railroad employee who is engaged in discharge of a duty, the performance of which requires him to be on or near track, need not keep strict watch for approaching trains, when not applicable. *Dyerson v. Union Pac. R. Co.* (Kan.), 15.
- Violating abrogated rule. *Bussey v. Charleston, etc., Ry. Co.* (S. Car.), 244.

Evidence.

- Certain question was objectionable, as calling for a conclusion of law or ultimate fact, since the duty of the deceased switchman to set the car in a particular manner to meet particular emergencies depended on the character of the employment and the rules thereof. *Chicago & E. R. Co. v. Lawrence* (Ind.), 504.
- Certain question was properly excluded, as the interpretation of the employer railroad's rules was not for the witness. *Chicago & E. R. Co. v. Lawrence* (Ind.), 504.
- That pole causing death of electric railway employee was crooked, and was placed nearer track than others in the line. *Kath v. East St. Louis, etc., Ry. Co.* (Ill.), 365.

Fellow Servants.

- Negligence of fellow servants of watchman at street car barn, in putting coal into cellar in such a manner that it was liable to fall, did not render railway company liable for his injury. *Lapre v. Woronoco St. Ry. Co.* (Mass.), 210.
- If evidence left it uncertain as to whether railroad or some unknown party was responsible for leaving switch open, there could be no recovery, on that ground, against it for death of its fireman. *Edgar v. Rio Grande W. Ry. Co.* (Utah), 29.
- Joint liability of his master and another railroad company where yard brakeman was injured in a collision which was due to the concurrent negligence of the two companies. *Feneff v. Boston & M. R. R.* (Mass.), 497.

Limiting Liability.

- Employee was not bound by provision of his passbook purporting to relieve his employer from liability for injuries to him, sustained while being transported from his home to his employment, and resulting from negligence of the car operators. *Eberts v. Detroit, etc., Ry.* (Mich.), 159.

MASTER AND SERVANT—Continued.

- Rule of employer railroad company that persons in accepting employment assumed all risks was immaterial, the company having no power to relieve itself by contract from the effect of disobeying certain ordinance; and such a disobedience by it was not a hazard assumed by deceased switchman. *Chicago & E. R. Co. v. Lawrence* (Ind.), 504.
- Nonassignable duties of master to servant. *Chicago, etc., Ry. Co. v. Barker* (Ind.), 228; *Pagan v. Southern Ry. Co.* (S. Car.), 254.
- Presumption of negligence does not arise from mere fact that servant's injury is due to defective machinery or appliances. *Newhouse v. Kanawha, etc., R. Co.* (W. Va.), 352.
- Presumption that negligence of master was cause of injury to servant, under law of Georgia. *Bussey v. Charleston & W. C. Ry. Co.* (S. Car.), 244.
- Proximate or concurring cause where fireman was killed by his engine running into open switch, which defendant railroad had left unlocked, but its responsibility for leaving it open was not shown. *Edgar v. Rio Grande W. Ry. Co.* (Utah), 29.

Rules.

- Abrogated by accustomed disregard. *Bussey v. Charleston, etc., Ry. Co.* (S. Car.), 244.
- Customary violation warranted inference of abrogation of rule prohibiting employees from riding on engines. *Feneff v. Boston & M. R. R.* (Mass.), 497.
- Reasonableness of, whether question for court or jury. *Bussey v. Charleston, etc., Ry. Co.* (S. Car.), 244.
- Rule that railroad company desired its employees not to incur risk from which they could protect themselves, and enjoining on them to take time necessary to do their duty with safety to themselves, was properly excluded in action for death of switchman. *Chicago & E. R. Co. v. Lawrence* (Ind.), 504.

Safe Work Place.

- Degree of care required of railroad to protect its servants from defective tracks. *Southern Ry. Co. v. Newton's Adm'r* (Va.), 528.
- Duty to furnish. *Louisville & N. R. Co. v. Pendleton's Adm'r* (Ky.), 213.
- Duty to furnish is a nonassignable one. *Newhouse v. Kanawha, etc., R. Co.* (W. Va.), 352.
- Includes entire railroad track. *Newhouse v. Kanawha, etc., R. Co.* (W. Va.), 352.
- Prima facie case of negligence where employee on construction train, while riding home, was injured by reason of suspension of wire cable across track. *Newhouse v. Kanawha, etc., R. Co.* (W. Va.), 352.

Scope of Employment.

- Act done by servant, while engaged in his master's work, causing injury to third person, but not done for the purpose of performing that work, cannot be deemed the act of the master. *Daugherty v. Chicago, etc., Ry. Co.* (Iowa), 558.
- Act of sectionmen in permitting child to ride on hand car in dangerous position. *Daugherty v. Chicago, etc., Ry. Co.* (Iowa), 558.
- Liability of master for servant's carelessness. *Feneff v. Boston & M. R. R.* (Mass.), 497.

MASTER AND SERVANT—Continued.**Who Are Employees.**

- Relation of master and servant, how created. *Louisville & N. R. Co. v. Pendleton's Adm'r* (Ky.), 213.
- Relation of master and servant suspended during deviation from regular employment. *Louisville & N. R. Co. v. Pendleton's Adm'r* (Ky.), 213.
- Relation of master and servant was not created by implication of law during servant's deviation from regular employment. *Louisville & N. R. Co. v. Pendleton's Adm'r* (Ky.), 213.
- Servant entering on his master's premises to begin work, or leaving them at its close, is not, during time of his entrance or exit, while using the ways provided, a licensee. *Feneff v. Boston & M. R. R.* (Mass.), 497.
- Workmen employed by traction company to clean and repair the cars of another street railway company were not co-employees of the latter. *Beckman v. Meadville, etc., Ry. Co.* (Pa.), 224.
- Yard brakeman, riding on passenger engine, by yardmaster's order to ride on any engine that might furnish the desired accommodation while going back and forth to his work, was not a mere licensee. *Feneff v. Boston & M. R. R.* (Mass.), 497.

MENTAL ANGUISH.

See COMMON CARRIERS; DAMAGES.

MORTGAGES.

- Certain after acquired property did not pass under trust deed given by railroad, since there was no purpose to which a railroad could put an undivided half interest in land. *Chicago, etc., Ry. Co. v. Tice* (Ill.), 336.

NEGLIGENCE.

See ACCIDENTS ON TRACK; CARRIERS; CARRIERS OF PASSENGERS; CHILDREN; CROSSINGS; CROSSINGS OF RAILROADS; FELLOW SERVANTS; FENCES; FIRES SET BY LOCOMOTIVES; FRIGHTENING TEAMS; IMPUTED NEGLIGENCE; INDEPENDENT CONTRACTORS; LICENSEES; MASTER AND SERVANT; STATIONS AND DEPOTS; STOCK, INJURIES TO; STREET RAILWAYS; TRESPASSERS.

Burden of Proof.

- On party asserting failure of duty. *Siemonsma v. Chicago, etc., Ry. Co.* (Iowa), 140.
- Defendant is liable for an injury caused to one using due care for his personal safety by defendant's negligence concurring with an accident without which the injury would not have occurred. *Illinois Cent. R. Co. v. Siler* (Ill.), 566.
- Directing verdict. *Newhouse v. Kanawha, etc., R. Co.* (W. Va.), 352.
- Duty to person injured, necessity of alleging violation of in complaint. *Chicago, etc., Ry. Co. v. Barker* (Ind.), 228.
- Franchise conferred by Legislature, right to recover for injury to third person caused by neglect of duty under. *Milton v. Bangor Ry., etc., Co.* (Me.), 89.
- In ascertaining existence or nonexistence of, the issue must be considered relative to all the circumstances of time, place and person. So held in *Gregg v. Northern Pac. Ry. Co.* (Wash.), 519.

NEGLIGENCE—Continued.**Last Clear Chance.**

Plaintiff who has received an injury by negligence of defendant, but who could have avoided it by exercise of ordinary care, cannot recover therefor, although defendant ought to have discovered his peril in time, where plaintiff's negligence continued up to the very moment he was hurt, and where his exercise of reasonable diligence before that time would have warned him of his danger and enabled him to escape by his own effort. *Dyerson v. Union Pac. R. Co.* (Kan.), 15.

Pleading.

Chicago, etc., Ry. Co. *v.* Barker (Ind.), 228.

Complaint was sufficient, since, in such cases, after stating facts showing a duty, very general averments of negligence are sufficient. *Southern Ry. Co. v. Stewart* (Ala.), 606.

Proximate Cause.

Consequences for which person will be responsible. *Louisville & N. R. Co. v. Daugherty* (Ky.), 178.

Definition of. *Illinois Cent. R. Co. v. Siler* (Ill.), 566.

Is question for jury. *Chicago, B. & Q. R. Co. v. Morris* (Wyo.), 654.

Railroad's negligence, if any, in permitting lumber to be piled on its right of way was not proximate cause of burning of plaintiff's hotel. *Bowers v. East Tennessee, etc., R. Co.* (N. Car.), 25.

What constitutes, whether question of law or fact. *Illinois Cent. R. Co. v. Siler* (Ill.), 566.

Wantonness.

Definition of. *Birmingham Ry., etc., Co. v. Landrum* (Ala.), 593.

NUISANCES.**Damages.**

Permanent damages to premises by a nuisance cannot be recovered, but owners thereof may enjoin commission of the acts constituting the nuisance, and recover the temporary damages sustained thereby. *Taylor v. Seaboard A. L. Ry.* (N. Car.), 83.

Physical suffering of pastor or persons composing congregation, trustees of religious society cannot recover for, in action for alleged nuisance to premises used as place of worship and residence of pastor. *Taylor v. Seaboard A. L. Ry.* (N. Car.), 83.

Immaterial as affecting railroad's liability whether its property was acquired by purchase or eminent domain. *Taylor v. Seaboard A. L. Ry.* (N. Car.), 83.

Noises occasioned by and incident to use and conduct of railroad freight and passenger terminal, and resulting in damages to premises as place of religious worship and residence of pastor. *Taylor v. Seaboard A. L. Ry.* (N. Car.), 83.

Railroad so operated as to needlessly cause injury and inconvenience. *Taylor v. Seaboard A. L. Ry.* (N. Car.), 83.

Running of trains and shifting of cars on Sunday, at time of regular church services held on premises near railroad freight and passenger terminal. *Taylor v. Seaboard A. L. Ry.* (N. Car.), 83.

PARTIES.

See COMMON CARRIERS; LIENS; RELIEF ASSOCIATIONS.

PENAL STATUTES.

See BAGGAGE; CARRIERS; CONSTITUTIONAL LAW; RAILROADS.

PERSONAL INJURIES.

See DAMAGES; FENCES; FIRES SET BY LOCOMOTIVES; FRIGHTENING TEAMS.

Damages.

Mental suffering, right to recover for. *Taylor v. Atlantic Coast Line R. Co. (S. Car.)*, 774.

Where all evidence bearing on question of damages is not in the record, but there is evidence of permanent disability and great suffering, a verdict for \$10,325 will not be held excessive. *Van Orman v. Lake Shore & M. S. Ry. Co. (Mich.)*, 747.

\$10,000 was not excessive verdict for loss of brakeman's foot. *Southern Ry. Co. v. Isom (Miss.)*, 288.

Evidence.

Testimony as to injury to plaintiff's hip was admissible under the declaration. *Mercer v. Cincinnati N. R. Co. (Mich.)*, 615.

PLEADING.

See CARRIERS OF PASSENGERS; COMMON CARRIERS; FELLOW SERVANTS; FRIGHTENING TEAMS; MASTER AND SERVANT; NEGLIGENCE.

POLICEMAN.

See MASTER AND SERVANT.

PRESUMPTION OF NEGLIGENCE.

See CARRIERS; MASTER AND SERVANT.

PRESUMPTIONS.

See DEATH BY WRONGFUL ACT.

PROXIMATE CAUSE.

See CARRIERS OF PASSENGERS; COMMON CARRIERS; FIRES SET BY LOCOMOTIVES; LICENSEES; MASTER AND SERVANT; NEGLIGENCE; STOCK, INJURIES TO.

RAILROAD COMMISSIONS.**Evidence.**

Was not error to refuse to admit order of railroad commissioner fixing speed at which the interlocker in question might be crossed, in action against two intersecting railroads for injuries to a passenger from a collision. *Van Orman v. Lake Shore & M. S. Ry. Co. (Mich.)*, 747.

RAILROADS.

See AGENCY; GARNISHMENT; JUDICIAL NOTICE; LIENS; MORTGAGE; RIGHT OF WAY.

Powers that may be exercised by corporations. *People v. Illinois Cent. R. Co. (Ill.)*, 722.

Railroad company has no power to maintain a public warehouse as an incident to its duty as public carrier. *People v. Illinois Cent. R. Co. (Ill.)*, 722.

Railroad property devoted for a long term of years to use as a public warehouse, for convenience of members of a grain trading exchange, is not thereby impressed with the right of the public

RAILROADS—Continued.

- to have such use continued. *People v. Illinois Cent. R. Co. (Ill.)*, 722.
- Right of state to establish penal regulation for public service corporations. *Morris-Scarboro-Moffitt Co. v. Southern Express Co. (N. Car.)*, 122.
- Warehouses, duty of railroads to maintain under certain statute. *People v. Illinois Cent. R. Co. (Ill.)*, 722.
- Warehouse, whether railroad can be compelled to maintain. *People v. Illinois Cent. R. Co. (Ill.)*, 722.
- Where it appears that one railroad company, to all intents and purposes, owns and operates another, though the autonomy of the latter is preserved for the convenience of the parties, the two companies may be condemned, in solido, for a tort committed in the course of such operation, and it is for the companies to rebut a prima facie case of the existence of such a relation between them. *Hollins v. New Orleans, etc., R. Co. (La.)*, 283.

RAILROADS IN STREETS.

- Grossest negligence to back train through streets of a town, without a lookout. *Hollins v. New Orleans, etc., R. Co. (La.)*, 283.

RELIEF ASSOCIATIONS.

- Where a policy was issued by a certain railroad's "Relief Department," and it had no legal entity, an action on the policy must be against the person making the contract or the railroad company. *Nelson v. Atlantic C. L. R. Co., Relief Department (N. Car.)*, 269.

REMARKS OF COUNSEL.

- See TRIAL.

RES IPSA LOQUITUR.

- See CARRIERS OF PASSENGERS.

RIGHT OF WAY.

- See EMINENT DOMAIN.
- Additional use of land over which a railroad right of way has been conveyed, when statute of limitations is no protection to railroad company. *McCulloch v. North Carolina R. Co. (N. Car.)*, 330.

SCALPERS.

- See TICKETS AND FARES.

SCHOOL CHILDREN.

- See TICKETS AND FARES.

SPURS AND SIDE TRACKS.

- See EMINENT DOMAIN.

STATIONS AND DEPOTS.

- Constitutionality of certain penal statute requiring railroads to keep their water closets at passenger depots in a sanitary condition, etc. *Houston, etc., R. Co. v. State (Tex.)*, 94.

Contributory Negligence.

- Where plaintiff, while descending slippery steps to railroad station, at first used the hand rail, but afterwards because his glove caught on some knobs on the rail, went down the middle of the

STATIONS AND DEPOTS—Continued.

- steps, though he knew of their slippery condition, and fell, he was guilty of contributory negligence barring recovery. *Stevenson v. Pittsburg, etc., Ry. Co. (Pa.)*, 325.
- Duty of carrier to furnish reasonably safe and comfortable depot accommodations, and not to permit its trains to stand across highway in front of its station for an unreasonable time, thereby preventing passenger from going into station, and compelling her to remain in the cold. *Louisville & N. R. Co. v. Daugherty (Ky.)*, 178.
- Duty of street railway to prevent its passengers alighting at regular station from being struck by other cars while making their egress. *Birmingham Ry., etc., Co. v. Landrum (Ala.)*, 593.

Hackmen.

- Right of local carriers, under certain constitutional provisions, to enter on railroad's depot grounds to solicit business, and to prevent railroad from inhibiting the soliciting of such business on its grounds, except by one concern operating carriages. *Oregon S. L. R. Co. v. Davidson (Utah)*, 201.
- Right of railroad to discriminate between hackmen in regard to permitting use of strip of land at passenger station. *Union Depot & Ry. Co. v. Meeking (Colo.)*, 195.
- Right of railroad to discriminate between local carriers in permitting use of its depot grounds. *Oregon S. L. R. Co. v. Davidson (Utah)*, 201.
- Right of railroad to prohibit all but one carriage concern from soliciting on its depot grounds the carriage therefrom of passengers and their baggage. *Oregon S. L. R. Co. v. Davidson (Utah)*, 201.
- Location of station at certain point, burden on railroad to show that its contract for is rendered invalid by interests of the public. *Atlanta, etc., R. Co. v. Camp (Ga.)*, 188.
- Location of stations at certain points, validity of contracts for as affected by interests of the public. *Atlanta, etc., R. Co. v. Camp (Ga.)*, 188.
- Quasi depots or stopping places, duty of carrier to provide lights for. *Wagner v. Atlantic Coast Line R. Co. (N. Car.)*, 735.
- Sufficiency of evidence of binding contract for maintenance of station and schedule. *Atlanta, etc., R. Co. v. Camp (Ga.)*, 188.

STOCK, INJURIES TO.

See FENCES.

- Burden of proof on railroad, attempting to escape liability because of an agreement between it and third person, claimed to relieve it from duty of maintaining lawful fence along its road through land of such person, to show that the third person maintained a lawful fence inclosing his premises. *Rinehart v. Kansas City So. Ry. Co. (Mo.)*, 47.

Contributory Negligence.

- Failure to maintain railroad right of way fence in accordance with contract is not proximate cause. *Southern Ry. Co. v. Dickens (Ala.)*, 280.
- No negligence on part of railroad was shown. *Beasley v. New Orleans, etc., R. Co. (Miss.)*, 297.
- Prima facie case for plaintiff was established by his evidence, notwithstanding substantial contradictory evidence was introduced by defendant railroad company, in action for killing colt entering on railroad right of way through gate in its right of way fence. *Rinehart v. Kansas City So. Ry. Co. (Mo.)*, 47.

STOCK, INJURIES TO—Continued.

Railroad was liable for killing plaintiff's colt, though it and a third person had agreed that it need not maintain a lawful fence along its road through such person's land. *Rinehart v. Kansas City So. Ry. Co. (Mo.)*, 47.

Right to recover for stock killed by train cannot be based on fact that railroad's fence was insecure, in absence of any statute requiring railroad's right of way to be fenced. *Beasley v. New Orleans, etc., R. Co. (Miss.)*, 297.

STREET RAILWAYS.

See CARRIERS OF PASSENGERS; INDEPENDENT CONTRACTORS; LEASES AND RUNNING POWERS; TICKETS AND FARES.

Certain statute authorizes companies incorporated thereunder to acquire and operate actually existing street railways, whether or not they are at the time being operated with legal authority. *Mayor, etc., v. North Jersey St. Ry. Co. (N. J.)*, 75.

Constitutionality of section 1, of the traction act of March 14, 1893, of New Jersey. *Mayor, etc., v. North Jersey St. Ry. Co. (N. J.)*, 75.

Constitutionality of statute providing that no action shall be maintained against a particular street railway company therein named for injuries caused by its failure to keep in repair those parts of the streets of a town occupied by its railway, unless one of its directors had 24 hours actual prior notice of the defect and notice of the injury within 14 days of its occurrence. *Milton v. Bangor Ry., etc., Co. (Me.)*, 89.

Forfeiture of franchise, certain acts on part of company were not cause for, but called for the regulation of its business. *Attorney General v. Toledo, etc., Ry. (Mich.)*, 326.

Franchise duty of street railway to keep portions of street in repair, right of highway traveler to recover for injuries sustained by reason of failure to properly perform. *Milton v. Bangor Ry., etc., Co. (Me.)*, 89.

Mutual Rights.

Right of way between street cars and other vehicles. *Daggett v. North Jersey St. Ry. Co. (N. J.)*, 715.

Right of street railway company to restrain the moving of a house lengthwise on the street, which cannot be done without occupying the company's track, etc. *Ft. Madison St. Ry. Co. v. Hughes (Iowa)*, 548.

Speed of car in excess of that permitted by ordinance rendered railway company liable for plaintiff's injuries, where when she drove upon the track the car was not dangerously near, and when she and her driver discovered it it was far enough away to have been avoided by turning off the track, had its speed not been excessive. *Butler v. Rhode Island Co. (R. I.)*, 322.

Street railway company may not excuse its motorman's negligence in failing to give signals or to reduce speed of his car, resulting in injury to one attempting to cross track behind another car, on the ground that it was not the custom to give such signals or to reduce speed when approaching or passing cars. *Birmingham Ry., etc., Co. v. Landrum (Ala.)*, 593.

Street railway has not the exclusive right to the use of its car tracks on the public streets of a city. *Eckels v. Muttschall (Ill.)*, 553.

TAXATION.**Exemptions.**

- Quarry was used in connection with the railroad for railroad purposes. *People v. Illinois Cent. R. Co.* (Ill.), 58.
- State taxation of railway gross receipts was unconstitutional as an attempt to regulate commerce among the states. *Galveston, H. & S. R. Co. v. Texas* (U. S.), 54.

TICKETS AND FARES.**See AGENCY.**

- Certain cautionary provisions printed on ticket was mere advice, and not part of the ticket. *Illinois Cent. R. Co. v. Gortikov* (Miss.), 650.
- Expiration of return ticket as affected by mistake in punching. *Illinois Cent. R. Co. v. Gortikov* (Miss.), 650.
- Injunctive relief against ticket brokers dealing in nontransferable excursion tickets, extent of. *Bitterman v. Louisville & N. R. Co.* (U. S.), 163.
- Injunctive relief against brokers dealing in nontransferable excursion tickets, question of multifariousness of bill for. *Bitterman v. Louisville & N. R. Co.* (U. S.), 163.
- Injunctive relief against ticket brokers dealing in nontransferable reduced-rate excursion tickets, when not to be denied on ground of adequate remedy at law. *Bitterman v. Louisville & N. R. Co.* (U. S.), 163.
- Interstate carrier's duty to prevent use of nontransferable excursion tickets by other than the original purchasers. *Bitterman v. Louisville & N. R. Co.* (U. S.), 163.
- Jurisdictional amount where bill is filed in federal circuit court to enjoin ticket brokers from dealing in nontransferable reduced-rate excursion tickets. *Bitterman v. Louisville & N. R. Co.* (U. S.), 163.
- Nontransferable excursion tickets, carrying on business of purchasing and selling as an actionable wrong against company issuing them. *Bitterman v. Louisville & N. R. Co.* (U. S.), 163.
- Nontransferable round-trip, reduced-rate excursion ticket, conditions of are binding upon anyone who acquires it. *Bitterman v. Louisville & N. R. Co.* (U. S.), 163.
- Passenger is not required to verify the ticket punch marks of selling agent. *Illinois Cent. R. Co. v. Gortikov* (Miss.), 650.
- Petition, in action for breach of contract in failing to issue a passenger ticket to the daughter of the man who had made the contract for her benefit, was open to the general demurrer, because there was no privity of contract between such daughter, the plaintiff, and the railroad company. *Ogles v. Nashville, etc., Ry. Co. (Ga.)* 765.
- Provision, printed on ticket, that in cases of doubt the passenger should pay the rate demanded by the conductor, take his receipt, and report to the general office, reasonableness of as part of the contract. *Illinois Cent. R. Co. v. Gortikov* (Miss.), 650.
- Right of carrier to sell nontransferable round-trip, reduced-rate excursion tickets. *Bitterman v. Louisville & N. R. Co.* (U. S.), 163.
- Street railway company was bound, under certain general provisions of its charter, by the requirement of a statute previously enacted that street railway companies shall transport school children at a reduced rate, although such statute may be unconstitutional as to already existing corporations. *Interstate, etc., Ry. Co. v. Massachusetts* (U. S.), 710.

TICKETS AND FARES—Continued.**Transfers.**

Duty to give proper ones. *Morrill v. Minneapolis St. Ry. Co.* (Minn.), 629.

Duty to see that proper transfer slip is given rests upon conductor, and not upon passenger. *Morrill v. Minneapolis St. Ry. Co.* (Minn.), 629.

Right of passenger to assume that conductor has properly punched his transfer. *Morrill v. Minneapolis St. Ry. Co.* (Minn.), 629.

Transfer slip is not the sole and exclusive evidence of passenger's right to ride. *Morrill v. Minneapolis St. Ry. Co.* (Minn.), 629.

TORTS.

See MASTER AND SERVANT.

TRANSFERS.

See TICKETS AND FARES.

TRESPASSERS.

See ACCIDENTS ON TRACK; FENCES; LICENSEES.

Care due from trainmen to trespassers on track. *Southern Ry. Co. v. Stewart* (Ala.), 606.

Contributory Negligence.

Physical infirmity of trespasser alighting from moving train may be considered. *Doggett v. Chicago, etc., Ry. Co.* (Iowa), 290.

Ejection.

Care required in ejecting trespasser from moving train. *Doggett v. Chicago, etc., Ry. Co.* (Iowa), 290.

Conductor, when ejecting trespasser from moving train, is not charged with knowledge, obtained in the exercise of ordinary care, of his crippled condition. *Doggett v. Chicago, etc., Ry. Co.* (Iowa), 290.

Lookouts.

Duty of railroad to trespassers on track. *Southern Ry. Co. v. Stewart* (Ala.), 606.

Passive acquiescence by railroad in use of track as foot-path did not create a duty to person so using track. *Chesapeake Beach Ry. Co. v. Donahue* (Md.), 272.

Person climbing over train obstructing crossing was not a trespasser. *Gesas v. Oregon S. L. R. Co.* (Utah), 305.

Railroad was liable for injuries to trespasser occasioned by failure of engineer to stop train in obedience to signals though he did not know why he was signaled to stop. *Chicago, etc., Ry. Co. v. Pritchard* (Ind.), 146.

Trespasser or volunteer injured by reason of unsafe premises cannot recover from their owner unless the injury was inflicted after his peril was discovered. *Louisville & N. R. Co. v. Pendleton's Adm'r* (Ky.), 213.

Trespasser walking on track near station could not invoke the failure of the railroad to comply with Md. Code Pub. Gen. Laws, art. 23, § 266, requiring trains to stop a half minute at stations to take on passengers. *Chesapeake Beach Ry. Co. v. Donahue* (Md.), 272.

Misconduct of counsel in, in effect, asking jury to discredit defendant's witnesses because it was a railroad company, was ground for setting aside verdict. *Dolph v. Lake Shore & M. S. Ry. Co.* (Mich.), 299.

TRIAL.

Papers found in jury room tending to show that verdict was fixed by quotient method, etc., were insufficient to show the verdict was improperly reached. *Birmingham Ry., etc., Co. v. Turner* (Ala.), 624.

Remarks of plaintiff's counsel, in action against street railway company for injury to child, in regard to the amount of damages, etc., were ground for reversal. *Saxton v. Pittsburg Rys. Co.* (Pa.), 603.

VICE PRINCIPALS.

See FELLOW SERVANTS.

VOLUNTEERS.

See TRESPASSERS.

WANTONNESS.

See NEGLIGENCE.

WAREHOUSEMEN.

See COMMON CARRIERS.

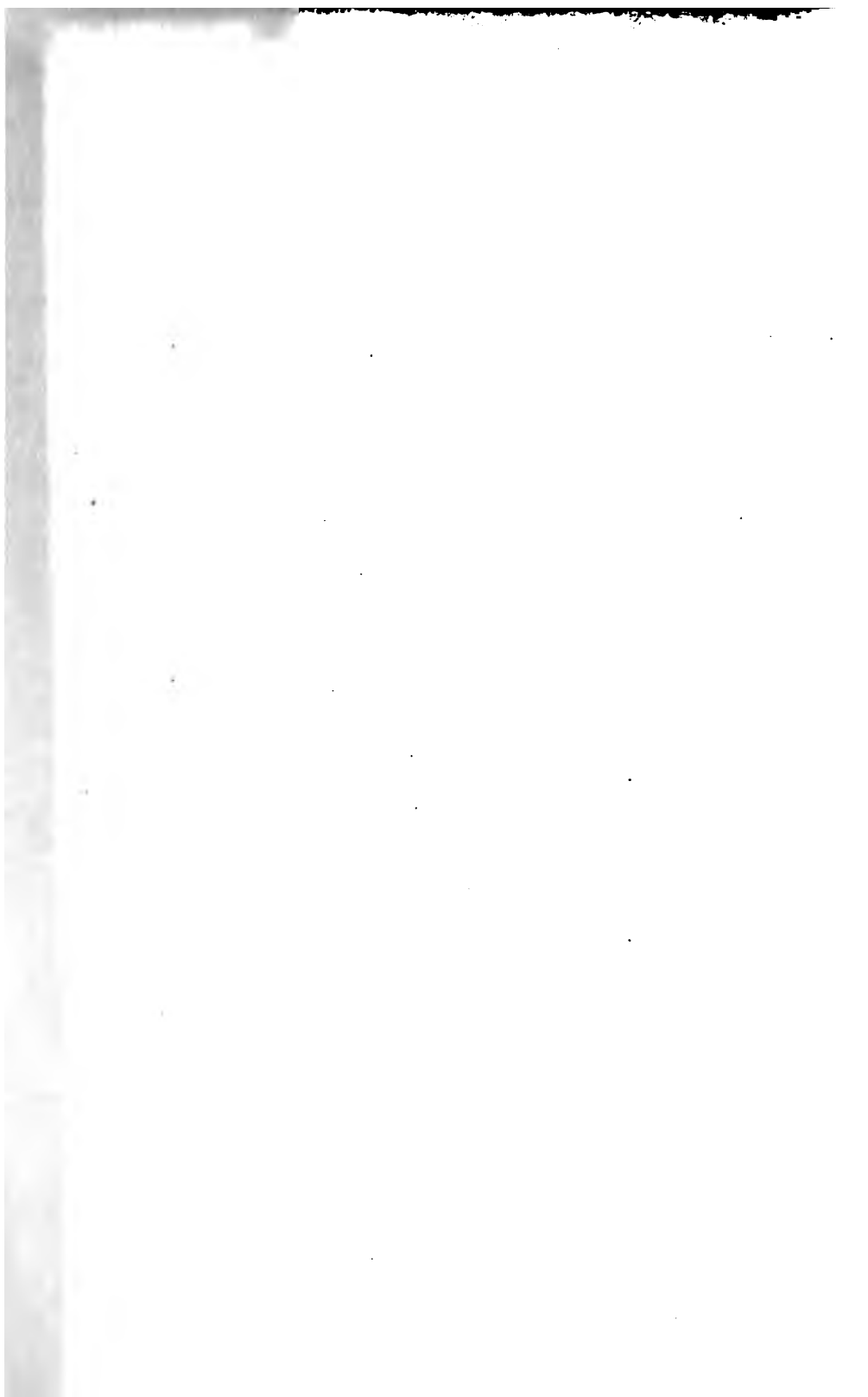
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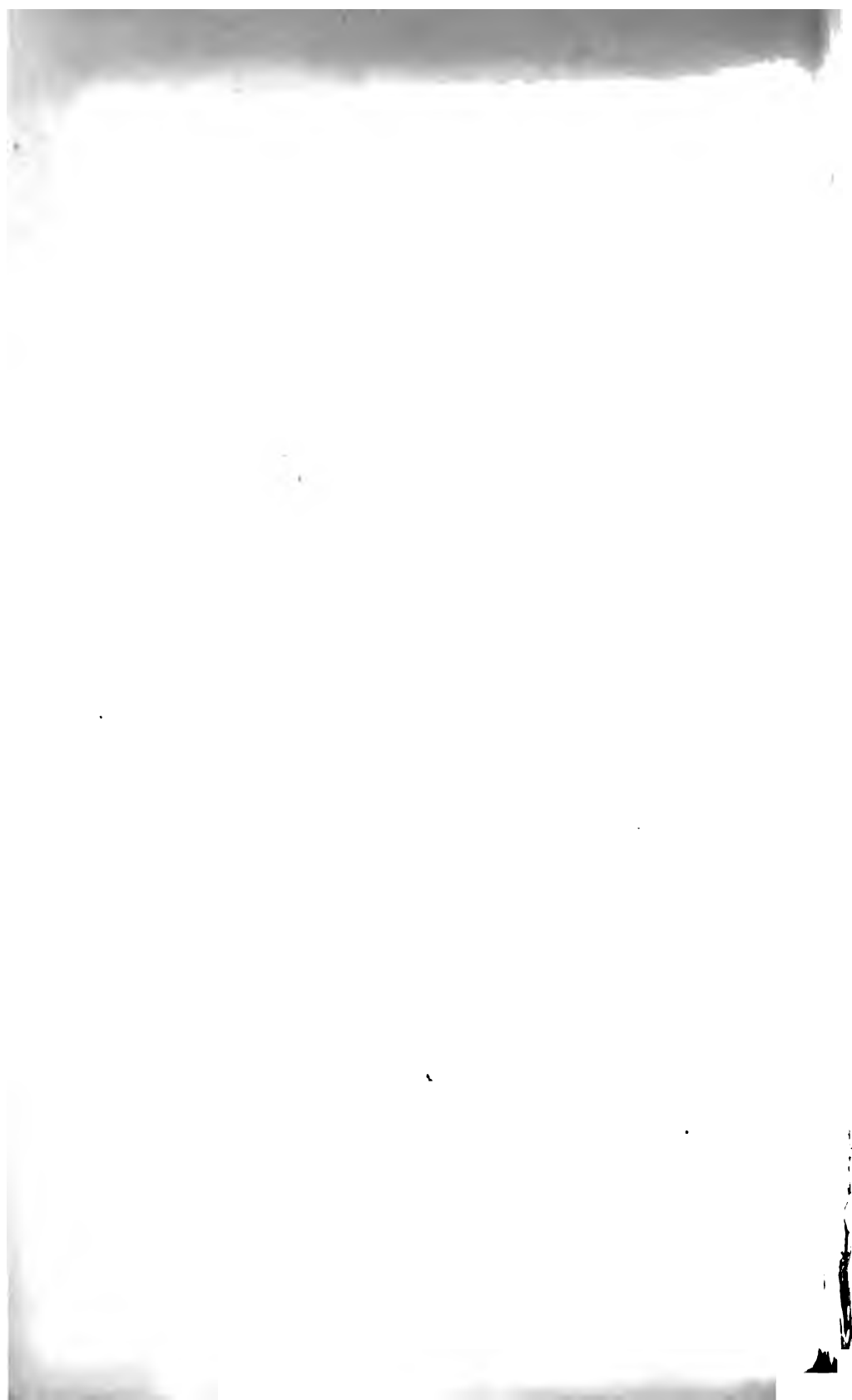
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